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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

RECORDED FROM 1888 (1891)

No. 21232

CHICAGO BURLINGTON & QUINCY RAILROAD COMPANY
AND CHICAGO BURLINGTON & QUINCY RAILROAD
TERMINAL COMPANY, PLAINTIFFS IN ERROR

CHARLES L. MCGUIRE

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED AUGUST 21, 1904

(31,822)



(21,322.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 247.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
AND CHICAGO, BURLINGTON & QUINCY RAILWAY
COMPANY, PLAINTIFFS IN ERROR,

vs.

CHARLES L. MCGUIRE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 In the Supreme Court of Iowa, May Term, 1907.

No. —. At Law.

CHARLES L. MCGUIRE, Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.,
Appellants.

Howell & Elgin, Attorneys for Appellee.

H. H. Trimble, Palmer Trimble and F. S. Payne, Attorneys for
Appellants.

Appellants' Abstract.

On the 30th day of October, 1901, Charles L. McGuire, the appellee, filed a petition in the District Court of Appanoose County, Iowa, in words and figures as follows, to-wit:

2 "Plaintiff for cause of action states as follows:

"That the defendant is indebted to him, said plaintiff, in the sum of \$2,000.00.

That the defendant is a corporation doing business in the State of Iowa, including Appanoose and Warren counties thereof, and operating a line of road from Des Moines, Iowa, through the town of Prole, on to Vanwert, and from there to Keokuk. On the 30th day of November, 1900, the said line of road, which the defendant owned was operating on said date, was formerly known and designated as the Keokuk & Western Railroad Company, but on said date defendant had absolute control of said line of road, as well as the rolling stock used thereon, including the employees necessary to operate said road.

"That on said date of November 30th, plaintiff was an employe of said defendant company, and engaged as a brakeman on a freight train, his route being from Keokuk via Vanwert to Des Moines.

"That on said date last hereinbefore named, at the town of Prole, in Warren county, while the plaintiff was in the exercise of due and proper care for his own safety and self-preservation, as the plaintiff was pursuing the ordinary line of his duties, and at a time when he was between the tender of the engine and the front car of the freight train attached to said engine, endeavoring to uncouple the air-hose, by turning the angle-cock on the car, the said hose referred to being a device used for setting and unsetting the brakes on the car attached to said engine, the said uncoupling being for the purpose of permitting the engineer in charge of said engine to switch off certain cars in said train, which he was pulling at the time, and leaving them in said town of Prole, the plaintiff's operation being the necessary operation to accomplish the uncoupling, and while the said plaintiff was between the said front car endeavoring as aforesaid to make said uncoupling, the train, at the time of the entrance

of said plaintiff between said tender and car, being stationary, that the engineer, defendant's employé in charge of said engine attached to said train, did, negligently, cause said train of cars and said engine to move, thereby bringing the front car and said engine together, or, in other words, by causing a slack of said train's coming against the said engine; that by reason of said moving of said engine, and permitting said slack of said train of about 13 cars to come against said engine, that plaintiff was caught between the certain other projection on said front car, known as a 'man-killer,' and a certain projection on the front of said tender, known as the 'dead wood,' which caught the plaintiff flatwise, crushing the plaintiff's abdomen, thereby causing excruciating injuries to the plaintiff in the region of his bowels, stomach and back, involving plaintiff's spinal cord; that said injuries to plaintiff's bowels, stomach and back, including the spinal cord and stomach, are permanent; that the space between said 'man-killer' and said 'dead wood,' when the slack was out of the train, was not sufficient to permit the plaintiff's body to be between the said 'man-killer' and the said 'dead wood,' without being injured; that said injuries to said plaintiff have been very painful at all times since said accident, and will, in the future, continue to be painful; that the plaintiff was not negligent in going between said cars, for the reason that at the time he went between said cars the train was absolutely stationary, and the plaintiff knew that said engineer was aware at the time plaintiff went between said cars to perform the necessary work, and the plaintiff had every reason to believe said engineer would not move said train until said plaintiff had come out from between said cars; that said company was negligent in the following particulars: (a) That said engineer was negligent in moving said engine, causing said engine and said cars to come together while said plaintiff was between said cars. (b) That the defendant's brakeman, who was also employed with said train and on duty, was negligent in not being in a proper position to watch plaintiff's movements and signal to the said engineer as to when to start the train, and when he should keep the same stationary. (c) Said engineer was negligent in taking off or loosening the brakes on said train before said plaintiff got out from between said cars.

"The plaintiff states that he has suffered a great loss of time by reason of said accident; in fact, has not been able to work since the date of said accident, and will not be able to perform any hard manual labor at any time in the future.

"Plaintiff states further, that he has been to a great expense for nursing by reason of said accident and injuries.

"Plaintiff states, that in the performance of the duties which he was performing at the time he was injured, he acted in the customary way in performing said duties as a brakeman on said road and other railroads.

"Plaintiff states that he is a railroad man, but by reason of his injuries aforesaid, he will never be able to pursue his said occupation of railroading.

"Wherefore, plaintiff, from all the foregoing and the premises

stated, prays for judgment against defendant in the sum of \$2,000.00, and for cost of this suit.

"C. F. HOWELL AND

"C. H. ELGIN,

"Att'ys for Plaintiff."

On the 13th day of February, 1902, the appellant, the Chicago, Burlington & Quincy Railroad Company, filed in said court its first amended answer in words and figures following, to-wit:

Comes now the Chicago, Burlington & Quincy Railroad Company, defendant in the above entitled cause, and for first amendment to its answer now on file in this case, says:

First Count: That it denies each and every allegation contained in plaintiff's petition.

Second Count: Said defendant now answering, not waiving or intending to waive any of the matters pleaded in the first count, for another and further answer says:

That plaintiff, Charles L. McGuire was guilty of negligence at the time he received the injuries complained of, which said negligence contributed directly to the injury complained of, so defendant says that said plaintiff was guilty of contributory negligence.

Third Count: The Defendant, the Chicago, Burlington & Quincy Railroad Company, not waiving any of the matters hereinbefore pleaded, for a further defense, says:

5 That the plaintiff ought not to have and recover in his action against the defendant, because it says that defendant, the Chicago, Burlington & Quincy Railroad Company was, at the time of receiving the injuries complained of by plaintiff, and always ever since has been, a corporation owning and operating a railroad through portions of the State of Iowa and other states of the United States; that in the operation of said railroad, defendant had at all times in its employ in the various departments of its service a large force of men; that the business of operating said railroad, including its various departments, is more or less hazardous and necessarily exposes its employes to risk of personal injury and sickness; and defendant says that because of the high rate charged by the ordinary accident insurance companies of the country, and the heavy premiums exacted by such companies from all who are engaged in the hazardous business of railroading, very few of the employes of defendant could afford to pay or would pay sufficient sums of money to secure from such insurance companies benefits or indemnity for their own protection and the protection of their families. That most of these employes were and are desirous of securing such benefits and protection in case of injury or sickness, when the same can be had at reasonable rates, and the defendant being desirous of aiding its employes in securing such benefits and protection in case of injury and sickness, and thus promoting the welfare of said employes, cultivating their good will and improving the service, did in the year 1889, establish and has ever since maintained and still maintains as a part of its service, a mutual benefit department, called the "Relief Department;" that the object of said department was then

and still is the creation and maintenance of a fund to be known as the "Relief Fund," out of which to pay definite amounts of money to the employes contributing thereto, when under the "regulations" hereinafter set forth and described in detail, they were and are entitled to payment by reason of disability from sickness or accident, and in the event of their death, from any cause whatever, to furnish funds for the proper burial of each member, and for relief for their families. Defendant also says that 95 per cent of all the

6 employes in the main service of defendant are members of the Relief Department and about 6 per cent of all other employes are members of the Relief Department.

That said Relief Department was organized and is now maintained in such manner that all the employes of defendant who elect to become members of said department are entitled to certain definite benefits because of disability, whether such disability is the result of injury caused by accident, or is the result of sickness, without fault of any kind, or whether happening while on or off duty; and also was organized and is now maintained in such manner that in case of death, the family of deceased, whether such death is the result of sickness or injury as aforesaid, is entitled to benefits, as in the "regulations" of said department provided.

Defendant further says that prior to the first day of June, 1889, the day on which said Relief Department was put in operation on defendant's railroad, the defendant adopted, under authority of its Board of Directors, certain "regulations," setting forth the nature and purpose of the said department; the manner in which it was to be conducted, the method of raising funds, the manner in which any of its employes might become members of the department; their right, duties and obligations while remaining such members; the amount of benefits and the manner of paying benefits, and the rights, duties and obligations of this defendant with respect thereto. A copy of such "regulations" as revised, to take effect January 1, 1900, is hereto attached, marked "Exhibit A," and is made a part of this answer. Reference is made thereto for information in detail.

Defendant further says that about the same date, to-wit, in 1889, there was a number of other railroad companies that were associated in interest with defendant, and together known as the Burlington System, which had, with the sanction of their Board of Directors, respectively adopted Relief Departments with "regulations" the same as those adopted by the defendant. Defendant says that among other provisions contained in said "regulations," it was provided that for the purpose of administration and economical management of its said Relief Department, this defendant might associate itself with
7 any of the other companies that had adopted similar "regulations" when such other Relief Departments had been authorized and approved by the Board of Directors of their respective companies.

Defendant says that pursuant to this authority, this defendant, for the purpose of uniting its Relief Department in management with the Relief Department of said other railroad companies, which were associated in interest with this defendant, did on the 15th day

of March, 1889, enter into a contract with such other railroad companies, a copy of which said contract is hereto attached, marked "Exhibit B," and made a part of this answer.

Defendant says that all said companies named in said contract were associated in interest in railroad business; that each of said companies had organized a Relief Department similar to the relief department of this defendant. That by the terms of this agreement, "Exhibit B" all these said companies were associated together with respect to the management and conduct of their Relief Departments, and were thus enabled to greatly economize in the expenditures of money in carrying on their Relief Departments by having the Relief Departments of all the associated companies under one management and controlled by one set of officers, thus reducing the expense of official salaries, office rent, fuel, lights, clerk hire, stationery and other expenses which were, and are incident to such Relief Departments.

That the associated companies thus organized together, designated the associated relief department of these associated companies as the "Burlington Voluntary Relief Department." Said Relief Department thus organized to run in joint administration by the parties to said contract, went into operation on the first day of June, 1889, and has continued business as a Relief Department ever since said date.

Defendant now answering says, that the Keokuk & Western Railroad Company was one of the associated companies prior to the first day of July, 1906; that on said first day of July, 1900, the defendant now answering leased of and from the said Keokuk & Western Railroad Company, all of its railway and railway property in the State of Iowa, including track and rolling stock, and on that day
8 took possession of said property and rolling stock and commenced to operate and continued to operate the same until the first day of January, 1901, when it bought all said property, and said property was conveyed to it as the sole owner of the same, and that it then commenced to operate and continued to operate the same as owner thereof until the commencement of this suit.

Defendant now answering says, that at the time of the injuries complained of, defendant was operating the railroad on which complainant was working, and that the said Keokuk & Western Railroad was then only a division of defendant now answering.

Defendant says that said "regulations" hereinbefore described and exhibited, provide that a fund shall be raised by the said Relief Department for the payment of definite amounts of benefits to employes of defendant now answering, which employes are to be known and are known as "Members of the Relief Fund." Such fund is to be raised by voluntary contributions from members of the Relief Department; by income derived from investment; by interest paid by defendant on monthly balance, and by appropriations made by defendant when necessary to make up deficiencies.

The said "regulations" also provide that the defendant, shall and does guarantee to the members of the Relief Fund, the fulfillment of all the obligations of said Relief Department; shall take charge

of and be responsible for the safe keeping of all money belonging to said Relief Fund, and shall pay into the said Relief Fund, interest at the rate of four (4) per cent per annum on all monthly balances in its hands, and shall supply, without expense to said Relief Fund, the necessary facilities for conducting the business of the department; and shall pay out of its own money all operating expenses of the same, and shall supply all deficits from its own funds.

These "regulations" also provide that there shall be furnished for the use of the Relief Department, a Superintendent, Assistant Superintendent, and a Medical Director.

Also provide that all money received by the said Relief Fund shall be held and kept by the defendant company in trust for the sole benefit of the Relief Department; that a committee,
9 called the "Advisory Committee," shall be appointed to conduct the business of the department, which committee shall direct all investments of money not required for immediate use.

These "regulations" further provide that when there is a deficit in the "Relief Fund," that is to say, not enough to meet any and all demands for benefits, due and payable, then the defendant company shall supply from its own funds sufficient money to cover the deficit, and shall cancel the liabilities of the Relief Fund; and they also provide that defendant shall guarantee the payment of all such benefits.

The "regulations" provide for the conduct and management of the "Relief Department;" also provide for the payment of interest on monthly balances; also provide that defendant company shall meet all deficits; pay the expense of administration; pay benefits to members of the Relief Fund when due, upon proper voucher, as hereinbefore specified, and faithfully perform all and singular the other obligations created by the said "regulations."

The "regulations" also provide that no person except employes working in defendant's service can become members; that membership is voluntary, and that any member may withdraw from membership at any time.

And defendant says that said "regulations" further provide how its employes may become members of the Relief Fund. Said "regulations" also provide and declare the amount of benefits to which such member is entitled in case of sickness or of disability resulting from injury or other cause; also provide for death benefits to such persons as are named by the member as his beneficiary in case of his death; also provide for the amount of death benefits and specify the condition under which such benefits shall be paid and are payable.

Also provide that employes not over forty-five years of age, upon passing satisfactory medical examination, and upon the approval of his application by the superintendent of the Relief Department, may become a member in the highest class allowed by his pay, or in any lower class, with or without additional death benefits. They also provide the method of becoming such member, which is by application in writing, signed by the person desiring to become a member.

10 Defendant says that said "regulations" plainly define the amount of contributions that each member must pay monthly, grading and classifying the member and amount of contributions by the amount of pay for wages received monthly by the members; these "regulations" also provide that each member shall be entitled to receive benefits when sick, or when injured, specifically stating the amount of such benefits; such benefits to be payable whether such sickness or injury was the result of mere accident or negligence on his part, or negligence on the part of the company; also provide for the amount of benefits in case of death from sickness, or injuries received, whether such injuries were the result of accident, or negligence.

These "regulations" require each applicant for membership to be an employé of defendant, and require that upon making application for membership, that the applicant shall be fully advised of all the facts pertaining to the "Relief Department." They require that a printed book be placed in the hands of the applicant, containing a plain statement of the purpose of the Relief Department; also containing copies of said "regulations" and of all contracts and papers exhibited with this answer, and require him to read carefully before he becomes a member, and if he cannot read, then officials of the Relief Department are required to have the same read to him and explained.

Defendant also says that pursuant to its obligations set forth and created by such "regulations" it has maintained and kept up said Relief Department; has paid from its own moneys all expenses of operating the same, including office rent, official salaries, clerk hire, stationery, printing, fuel, light, traveling expenses, expenses of medical director and numerous medical examiners, and a large number of other expenses too numerous to mention in detail, and that it still continues to pay such expense which in the aggregate amount to over sixty thousand dollars (\$60,000) per annum.

Defendant avers that it has paid of its own money for operating expenses to December 1, 1900, the sum of six hundred and twenty-one thousand, five hundred and seventy-two dollars and forty-four cents (\$621,572.44). This does not include office rent for the Relief Department, or of medical examiners; does not include
11 expenses of light, fuel, telegraph service, mail, and express service and passes issued to officers of said Relief Department and others who work for Relief Department. This does not include the services of the officers of the defendant, nor service of clerks of defendant, whose service is not wholly devoted to the Relief Department, a large amount of which is being furnished, which said service and incidentals is worth approximately fifty thousand dollars (\$50,000.00) per annum. Defendant has also, in obedience to its obligations and guarantees created by said "regulations," paid out of its own funds into the said Relief Fund to supply deficits in said Relief Fund the sum of forty-two thousand five hundred thirty-two dollars and ninety-four cents (\$42,532.94), which said payment was necessary to pay the benefits, and which it has not and cannot recover back.

Defendant avers that under the "regulations" of the Relief Department, it has no right to reimburse itself out of said Relief Fund, for such advance and payment as above stated, but that the said fund so augmented by such payment and advances is held by it as a trust fund for the sole benefit of the members of the Relief Fund.

Defendant also says that from the time of its organization up to the present time, a large amount of money has been paid from said Relief Fund in the way of benefits, to-wit: To December 31, 1900, the sum of two million six hundred seventy-one thousand five hundred and ten dollars and fifty-four cents (\$2,671,510.54); that there was paid for sickness, one million two hundred ninety-four thousand seven hundred and ninety dollars and fifty cents (\$1,294,790.50); and for benefits for injuries and death resulting from injuries, one million three hundred and seventy-six thousand seven hundred and twenty dollars and four cents (\$1,376,720.04).

Defendant further says that plaintiff, Charles L. McGuire became an employé of the defendant as a brakeman on its railroad on or about the 19th day of November, 1900; that he made voluntary application in due and legal form in writing on the 19th day of November, 1900, to be admitted as a member of said Relief Department of defendant, copy of which application is hereto attached,

marked "Exhibit C," and made a part of this answer; and
12 that pursuant to said application, he was heretofore, to-wit, on the 20th day of November, 1900, duly admitted to membership in said Relief Department. A book containing the "regulations" of the Relief Department heretofore described and exhibited, also containing form of contract, "Exhibit B," was on the 4th day of December, 1900, delivered to the said Charles L. McGuire.

That the said Charles L. McGuire became a member of the third class and remained a member of said Relief Department, until the 30th day of November, 1900, having paid all his contributions up to that date, which contributions in the aggregate amounted to eighty-five cents (\$5¢), and was entitled to the benefits of membership under the terms of his admission as a member of the Relief Fund, as hereinbefore set forth and averred.

And defendant further avers that it agreed with the said Charles L. McGuire, when he, said Charles L. McGuire made application for membership in said Relief Fund, and when he became a member, that it, said defendant, would continue to maintain the said Relief Department so long as the said Charles L. McGuire remained a member of the same, and would do so at its own expense; it also agreed and guaranteed that it would maintain and keep up the Relief Fund so that at all times when the said Charles L. McGuire might be entitled to benefits according to the "regulations" hereinbefore described and made an exhibit to this answer; the said Relief Department would be able to pay and would pay said Charles L. McGuire all benefits to which he was entitled.

The said Charles L. McGuire on his part, in consideration of the above named agreement and guarantee by defendant, agreed that when he received any benefits on account of sickness or injury, the receipt of such benefits should operate as a *release and discharge* of

defendant from all damages caused by sickness or by such injury; that the terms of the contract with the Relief Department gave him the right to such benefits if he elected to receive the same.

So defendant says that in consideration of the mutual agreement and of the guarantee of the defendant as above set forth, defendant was not only equitably but legally bound to the
13 said Charles L. McGuire to pay all benefits which might be due him because of sickness, or injuries suffered by him during his service with defendant.

And defendant says that on or about November 30, 1900, Charles L. McGuire was injured by an accident near Prole, Iowa, being caught and squeezed between a freight car and a locomotive engine.

Defendant says that said plaintiff was injured as aforesaid on the 30th day of Novem. , 1900, and that he was, pursuant to the terms of his contract of membership, entitled to benefits because of said injury from the 1st day of December, 1900, to the 24th day of October, 1901, a period covering three hundred and twenty-eight (328) days in all. That said benefits, during said period, amounted in the aggregate to four hundred and ninety-two dollars (\$492.00). That said plaintiff demanded said benefits, and that same were paid to said plaintiff by said Relief Department from time to time as per terms of the said "regulations," being paid by drafts or checks on said Relief Fund, copies of which drafts or checks are hereto attached and marked Exhibits "1" to "11" inclusive, and made part of this answer.

Defendant also says that during said period defendant paid from said Relief Fund, on account of surgical and medical attention, nursing and care, the further sum of three hundred and thirty dollars (\$330.00) during the same period, all of which was paid pursuant to the provisions of said "regulations" and the contract of membership of the said plaintiff, copies of vouchers for which are attached and marked Exhibits "12," "13," "14," and "15," and made part hereof.

Defendant says that under the said "regulations" it is the duty of the officers and managers of said Relief Department to make and transmit to members who shall become injured, checks for disability, benefits accruing and due to such member while disabled, and in pursuance of said duty checks were made out and delivered to said plaintiff and in favor of said plaintiff for disability, benefits due him because of said injury to the amount of four hundred and ninety-two dollars (\$492.00) as aforesaid. That said checks were received by
14 said plaintiff and were appropriated by plaintiff having been cashed by him for his benefit and use, so defendant says that such acceptance and appropriation of said benefits by plaintiff were under his contract of membership and the "regulations" of said Relief Department, a release and satisfaction in full of all claims for damages against defendant, including his claim sued on in this case, arising from or growing out of said injury. That by the express terms of the contract between plaintiff and defendant, the acceptance of said benefits by plaintiff was a full accord and satisfaction of the claim sued on and growing out of the injury complained of.

Defendants pleads such payment of benefits and acceptance of benefits by plaintiff as a full satisfaction and release of the damages sued

for in this case, and having fully answered, defendant prays to be discharged with its costs in this case.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY,

Defendants.

"EXHIBIT A."

Regulations of the Chicago, Burlington & Quincy Relief Department.

Adopted by Vote of the Directors of the Chicago, Burlington & Quincy Railroad Company.

General.

1. The "Relief Department" is a department of the Company's service in the executive charge of a superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the president, except in such matters as are under the control of the advisory committee.

Wherever in these regulations the following words occur without qualification, they will, unless otherwise provided by the Memorandum of Agreement of March 15, 1889, hereto prefixed, have the meaning herein defined:

"Company," will mean the Chicago, Burlington & Quincy Railroad Company; "President," "Board of Directors," and "Relief Department" or "Department," will mean the president, board
15 of directors and Relief Department, respectively, of said Company; "Relief Fund," "Advisory Committee" or "Committee," "Superintendent," "Medical Director" and "Medical Examiner," will mean the Relief Fund. Advisory Committee, superintendent, medical director and medical examiner, respectively, of said Relief Department.

2. The object of the Department is the establishment and management of a fund, to be known as the "Relief Fund," for the payment of definite amounts to employes contributing thereto, who are to be known as "members of the Relief Fund," when under the regulations they are entitled to such payment by reason of accident or sickness, or, in the event of their death, to the relatives or other beneficiaries designated by them with the approval of the superintendent.

The Relief Fund will consist of voluntary contributions from members thereof, income derived from investments and from interest paid by the Company, and appropriations by the Company when necessary to make up deficiencies.

4. The Company shall have general charge of the Department, guarantee the fulfillment of its obligations, take charge of all moneys belonging to the Relief Fund and be responsible for their safe keeping, pay into the fund interest at the rate of four per cent per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the Department, and pay all the operating expenses thereof.

5. There shall be an advisory committee, constituted as follows:

The general manager of the Chicago, Burlington & Quincy Railroad shall be *ex officio* a member and chairman of the committee.

The other members of the committee shall be chosen annually, in November or December, to serve for one year from the 1st of January next succeeding, or until their successors are chosen, as follows:

One-half shall be chosen by the board of directors, and one-half by the employés, members of the Relief Fund, from among themselves by electoral divisions, each electoral division choosing one representative. The number of electoral divisions and extent of each shall be from time to time determined by the president.

6. The members of the committee chosen by the members of the Relief Fund shall be elected by ballot, the vote being taken and certified under oath by tellers selected by the committee.

In balloting for members of the committee each member of the Relief Fund shall be entitled to cast one vote.

For the committee to serve during the first fiscal year, or during the remainder of any fiscal year after the termination of any agreement for associated administration as hereinafter provided, the members to represent the contributing employés shall be designated by the president.

In the event of the termination of service by any member of the committee or of his withdrawal from membership in the Relief Fund, his membership on the committee shall thereupon terminate.

Any vacancy among the members elected by the contributing employés shall be filled by the succession to the position of the employé on the same electoral division who received the next highest number of votes to the retiring member.

Any vacancy among the members chosen by the board of directors shall be filled by appointment by the president.

Such members, and the members to be chosen by the board of directors for the original committee, shall serve until their successors are chosen as above provided.

The superintendent shall be secretary of the committee.

* * * * *

8. The committee shall have general supervision of the operations of the Department and see that they are conducted in accordance with the regulations.

The committee shall hold stated meetings once in three months, at such time and place as they shall determine, and shall meet at other times at the call of the chairman.

It shall be the duty of the chairman to call special meetings of the committee upon the written request of three of its members.

9. The superintendent shall have charge of all business pertaining to the Department. He shall employ such clerks and other assistants as may be necessary, prescribe the forms and blanks to be used, certify all bills and pay-rolls of the Department, sign all orders for the payment of benefits, furnish to the commit-

tee such reports as they may require, decide all questions properly referred to him, and exercise such other authority as may be conferred upon him by the president or the committee.

10. There shall be an assistant superintendent, who shall be possessed of all the powers of the superintendent in his absence, and shall at all times perform such duties as may be assigned to him by the superintendent.

11. There shall be a medical director, who shall, subject to the approval and control of the superintendent, appoint medical examiners, assign them to districts, direct their work and have general supervision of the medical and surgical affairs of the Department. The medical director may be the same person as the superintendent or assistant superintendent.

Wherever used in these regulations the words "medical officers" shall be held to mean the medical examiner in charge of any case, and the medical director.

The superintendent, assistant superintendent and medical director shall be designated by the president.

12. The medical examiners shall make the required physical examination of applicants for membership in the Relief Fund, prepare applications, report the condition of sick or injured members, decide when members are disabled, and when they are able to work, certify bills for surgical treatment, perform such other duties as may be required of them by the medical director, and conform to such rules as he may establish.

13. The moneys received for the Relief Fund shall be held by the Company in trust for the Department. The committee shall direct the investment, and any changes therein, of money which is not required for immediate use.

The Company being the trustee and guarantor of the Relief Fund, the investments shall be in such securities as shall have been approved by the board of directors, and shall be in the name of the Company "in trust for the Relief Department."

14. If, during any period of three years, beginning January 1, 1892, the amount contributed by the members of the Relief Fund and received from other sources, including any unexpected balance not otherwise appropriated, shall not be sufficient to pay the benefits as they become due, the Company shall advance the amount necessary for this purpose, reimbursing itself if the income within the period will allow, and if at the end of any such period there shall still be a deficiency, as shown by the treasurer's books, the Company, having advanced the money necessary to pay the deficiency, as above provided, shall assume the same and cancel the liability of the Relief Fund.

But if at the end of any such period there shall be a surplus, after making due allowance for liabilities incurred and not paid, such surplus shall not be used to make up any deficiency in any previous period, but shall be used for the sole benefit of members of the Relief Fund, in payment of benefits as provided in the regulations.

unless otherwise determined by a vote of two-thirds of the committee and approved by the board of directors.

15. The fiscal year of the Department shall begin with the 1st day of January of each year.

The condition of the Relief Fund at the close of each fiscal year shall be audited and reported on by competent person or persons selected for that purpose by the members of the committee who represent the members of the Relief Fund.

16. Amendments to the regulations of the Department may be proposed to the committee, at any stated meeting, by any member of the committee. Amendments so proposed may be acted upon only at a subsequent stated or special meeting; but no amendment shall be operative unless adopted by vote in the affirmative of a majority of the whole committee, approved by the board of directors, and duly announced by the superintendent; and any amendment so adopted,

17. approved and announced shall be binding upon the Company and the members of the Relief Fund and all persons claiming through them from the date specified in the announcement of the same.

Membership.

17. All employ  s of the Company who, under the regulations, are contributors to the Relief Fund, shall be designated as "members of the Relief Fund."

18. In referring to employ  s of the Company, the word "service" shall mean employment by this Company, or by any Company associated with it in the administration of their Relief Departments; and the service of any employ   shall be regarded as continuous for the time during which he has been continuously in the employ of this Company and any one or more of such associated companies.

19. There shall be five classes of members. The highest class in which an employ   may be a member, shall be determined by his regular or usual monthly pay, as follows:

Monthly Pay.	Highest Class.
Less than \$35.00.....	First
\$35.00 or more, but less than \$55.00.....	Second
\$55.00 or more, but less than \$75.00.....	Third
\$75.00 or more, but less than \$95.00.....	Fourth
\$95.00	Fifth

For employ  s paid by the hour, trip, piece, or in any other way than by the month, the highest class shall be determined by the usual amount of earnings in a month.

For persons in the service of this Company, and of one or more of the companies associated with it in the administration of their Relief Departments, the highest class shall be determined by the total pay received from all such companies, and the membership shall be in the Relief Fund of this Company, if the largest amount is received therefrom.

20. No employé shall be required to become a member of the Relief Fund.

21. Any employé not over forty-five years of age may, upon passing a satisfactory medical examination, and upon approval of his application by the superintendent, become a member in the highest class allowed by his pay, or in any lower class, with or without additional death benefits of the first class not greater in the aggregate than three times the death benefit of the class he enters.

22. Any member not over forty-five years of age may, upon passing a satisfactory medical examination, and upon approval of his application by the superintendent, change to any higher class allowed by his pay or take additional death benefits of the first class to such extent that the aggregate or additional death benefits shall not exceed three times the death benefit of the class in which he is or becomes a member.

23. Any member may, at the beginning of any month, change to a lower class, or relinquish all or a part of his additional death benefits.

24. When a member voluntarily changes to a lower class, the amount of the death benefit he retains shall not exceed the maximum of that class.

25. An employé cannot remain a member in a class higher than that allowed by his pay, but when the pay of a member is reduced he shall not be required to make any change in the amount of his death benefit; and any excess of death benefit above that to which he is entitled by his new class shall be treated as additional death benefit.

If a member declines to effect a proper reduction of class under the foregoing, the superintendent shall have authority to cancel his membership.

* * * * *

30. When a member absents himself from duty for a period of six days without the permission of his employing officer previously obtained, or without giving, meanwhile, reason for absence, satisfactory to his employing officer, he shall be held to have left the service without notice, and his membership shall be held to have terminated on the day preceding such absence. If such member be reinstated in the service he may also be reinstated in membership upon approval of the superintendent.

21 31. If a member is relieved from service on account of necessary reduction in force, and is afterward re-employed, he may again become a member of the Relief Fund, although then over forty-five years of age, upon application at the time of re-employment, upon passing a satisfactory medical examination in which his physical condition at the termination of former employment will be given due consideration, and upon approval of his application by the superintendent.

Applications.

32. Membership in the Relief Fund shall be based upon an application in the following form:

Application for Membership in the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Company.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railroad Company:

I, ——— of ———, in the County of ——— and State of ———, now employed by the Chicago, Burlington & Quincy Railroad Company, do hereby apply for membership in the Relief Fund of the Relief Department of said Company, and consent and agree to be bound by the regulations of said Relief Department, which regulations I have read or have had read to me, and by any other regulations of said Department hereafter adopted and in force during my membership, and by any agreement now or hereafter made by the said Company with any other corporation or corporations now or hereafter associated with it in the administration of their Relief Departments.

I also agree, That the said Company, by its proper agents, and in the manner provided in said regulations, shall apply, as a voluntary contribution from any wages earned by me under said employment, the sum of ——— (\$——) per month, for the purpose of securing the benefits provided in the regulations for a member of the relief fund of the ——— class, with ——— additional death benefit of the first class.

Unless I shall hereafter otherwise designate, in writing, with the approval of the superintendent of the Relief Department, death benefit shall be payable to my wife (husband), if I am married at the time of my death; or, if I have no wife (husband) living, then to my children collectively, each to be entitled to an equal share, including, as entitled to the parent's share, the issue of any deceased child; or, if there be no children or such issue living, then to ——— if living; and if not living, then to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representatives; or, if there be no such next of kin, the death benefit shall lapse, and the amount thereof shall remain as a part of the Relief Fund, without claim for the same.

Any funeral or other expenses incident to my death, which shall have been paid by the superintendent of the Relief Department, in accordance with the regulations, shall be held to be in part payment of the said death benefit, and shall be deducted from the total amount thereof before payment to the person or persons entitled to receive the same.

I also agree, That, in consideration of the amounts paid and to be paid by said Company for the maintenance of said Relief Department, and of the guarantee by said Company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all

other companies associated therewith in the administration of their Relief Department, for damages arising from or growing out of said injury; and further, in the event of my death no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said Relief Department, of all claims against said Relief Department, as well as against said Company, and all other companies associated therewith, as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said Company, or any other Company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said Relief Department and of said Company created by my membership in said Relief Fund, shall thereupon be forfeited without any declaration or other act by said Relief Department or said Company.

I also agree, That this application, upon approval by the superintendent of the Relief Department, shall make me a member of the Relief Fund, on and from the date specified in such approval, and constitute a contract between myself and the said Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in the employment of said Company, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages shall apply also to any other amounts which I may agree to pay under the provisions of said regulations, by reason of changes made as aforesaid, and shall constitute an appropriation and assignment in advance of such portions of my wages, to the said Company in trust, for the Relief Fund, for the purpose of maintaining my membership therein, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I also agree, That my being transferred to the service of any other Company associated with said company in the joint operation of their Relief Departments shall operate to transfer my membership in the Relief Fund of said Company to the Relief Fund of the Company to the service of which I am transferred, and that this application and contract shall thereupon become binding between me and such other Company, the same as if originally made by me with such other Company.

I also agree, For myself and those claiming through me, to be especially bound by regulation numbered 63, providing for final and conclusive settlement of all claims for benefits or controversies of what-soever nature by reference to the superintendent of the Relief Department, and an appeal from his decision to the advisory committee.

I certify, That I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury

24 or disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the medical examiner, which statement shall constitute a part of this application.

I also agree, That any untrue or fraudulent statement made by me to the medical examiner, or any concealment of facts in this application, or any attempt on my part to defraud or impose upon said Relief Fund, or my resigning from, or leaving the service of the said Company, or my being relieved or discharged therefrom, shall forfeit my membership in the said Relief Fund, and all benefits, rights or equities arising therefrom, except that such termination of my employment shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I may be entitled by reason of disability beginning and reported before and continuing without interruption to and after such termination of my employment, nor of the right to continue my membership in respect of death benefit only, as provided in said regulations.

In Witness Whereof, I have signed these presents at — in the county of —, State of —, this — day of —, A. D. 19—, this application to take effect —, A. D. 19—, or on such subsequent date as may be designated by said superintendent; provided, however, that if I become disabled before said date and continue disabled beyond said date this application shall not take effect until the first day after my recover-.

The following changes made before execution: — — —.

The last application in the foregoing form, or in a corresponding earlier form, which shall have been made by an employee, shall be known as his Principal Application.

Upon the approval of the principal application of an employé by the superintendent, he shall be a member of and from the date specified in such approval, and the superintendent shall issue to him a certificate of membership attached to a copy of the regulations then in force.

* * * * *

25

Contributions.

35. The word "contribution" wherever used in these regulations shall be held and construed to refer to such designated portions of the wages payable by the Company to an employé, as he shall have agreed, in his application, that the Company shall apply for the purpose of securing the benefits of the Relief Fund; or to such cash payment as it may be necessary for a member to make for said purpose.

36. Contribution for full membership shall be made monthly in advance, at the following rates: First class, 75 cents per month; second class, \$1.50; third class, \$2.25; fourth class, \$3.00; fifth class, \$3.75.

these rates thereafter during the continuance of disability. Also, provision by the Department for necessary surgical treatment; or, when such provision is not made, payment to or in behalf of the member of such an amount for necessary surgical treatment as may be approved by the medical director. The decision as to whether in any case surgical treatment is necessary, and as to what kind of service shall be regarded as surgical treatment shall rest with the medical officers of the Department. No member shall have authority to contract any bills against the Department, and nothing herein shall be held to mean or imply that the Department shall be responsible for the payment of such bills as a member may contract or his surgeon may charge. Bills for surgical attendance, to be considered by the Department, must be made out against the member and must be itemized.

To establish a claim for accident benefits the accident must be reported immediately upon its occurrence and there must be external positive and visible evidence of physical injury by accident sufficient to cause immediate disability. In cases of alleged sprain, strain, wrench and the like, where physical proof of disabling injury is lacking, the member must furnish substantiated history, satisfactory to the superintendent, of violence accidentally inflicted, sufficient and liable to cause disabling injury, otherwise accident benefits will not be allowed.

When a member meets with any accident from which disability may result and on account of which he wishes to reserve the right to claim accident benefits, he shall report the accident to his employing officer immediately upon its occurrence and also report in person to the medical examiner the same as provided in regulation 55 in case of actual disability.

If a member receives accidental injuries producing the immediate severing of, or necessitating, in the opinion of the medical officers of the Department, the amputation of, a hand or foot at or above the wrist or ankle, he may either receive daily benefits with surgical treatment as above provided, also an artificial limb when such can be worn, or, in lieu thereof and in full of all claims or demands of whatsoever nature against the Department and the Company, and upon executing a release to this effect satisfactory to the superintendent, he may receive the sum of \$200.00 and a further sum as follows: for a member in the first class, \$500.00; second class, \$1,000.00; third class, \$1,500.00; fourth class, \$2,000.00; fifth class, \$2,500.00; and twice these amounts in case of loss of both hands or both feet or of one hand and one foot. Any such member who has been in receipt of daily benefits on account of such injury, and who has not yet been reported able to work by the medical examiner, may receive in full settlement the above fixed amounts, less the amount already paid to and for him on account of such injury, upon execution of a release as above provided.

Sick Benefits:

47. Payment for each day, except for the first six days, of disability classed as due to sickness, for a period not longer than fifty-two (52) weeks, at the same rates as for accident benefits.

To establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability.

Disability resulting from infection of a cut, abrasion, scratch, puncture or other wound, or from any injury, not immediately disabling and not reported at the time of the occurrence of the accident causing the injury, or from poison however taken into or acting upon the body, or from any overdose of medicine or drug taken by mistake, or from surgical operation necessary for the removal of some defect, which would otherwise probably produce disability, or from sunstroke or frostbite, shall be classed as due to sickness.

Death Benefits:

48. Payment, in accordance with the conditions prescribed in the regulations, upon the death of a member, as follows: To the beneficiary of a member of the first class, \$250; second class, \$500; 30 third class, \$750; fourth class, \$1,000; fifth class, \$1,250.

Also, payment of \$250 for each additional death benefit of the first class to which the beneficiary is entitled.

49. If an employé, entitled to become a member upon passing a satisfactory medical examination, and who has not previously been examined and rejected, shall have executed a prescribed form of "Notice of Application," but shall not have had opportunity to be examined before the date specified thereon for his application to take effect, he shall be protected by such notice of application, under and in accordance with the terms of the prescribed form of principal application from said date until he shall have had opportunity to be examined; provided, however, that he shall only be entitled to benefits payable on account of injury or death caused solely by accident happening in such interval, and if his principal application is not approved, his rights and obligations in the Relief Fund shall cease from the time of medical examination; and if he shall refuse or neglect to be examined when opportunity for examination is offered, his rights and obligations in the Relief Fund shall thereupon cease.

An applicant, protected in accordance with the foregoing against accident only, shall contribute at half rate while so protected. The principle of the foregoing shall also apply in case of notice of application for higher class or additional death benefit.

50. A member shall not be entitled to receive benefits continuously for more than fifty-two weeks for any disability caused by accident or sickness or by a succession or combination of accident and sickness, except that in case of disability from accident alone and in case of succession of accident disability upon sickness disability, benefits shall be payable at half rates after said fifty-two (52) weeks.

A member not entitled to further sickness benefits under this regulation shall contribute for, and be entitled to, death benefit only until reported able to work by the medical examiner.

A member shall not be entitled to benefits for disability from any cause while still disabled from a preceding cause.

31 In case of relapse, in sickness disability, occurring within two weeks, or of succession of sickness disability upon an accident disability which lasted six days or more, the first six days

shall not be deducted in computing time of sick benefits; and where such immediately preceding accident disability lasted five days or less, the number of days to be deducted shall be six, less the number of days of such accident disability.

51. When a member shall have received benefits for fifty-two weeks, in the aggregate of all disabilities by sickness, from the Relief Fund of this Company and of all other companies associated therewith in the administration of their Relief Departments, he shall not be entitled to further disability benefits, nor shall he be required to make further contribution, except for death benefit, such contribution to begin at the expiration of said fifty-two weeks, and to be at the rates fixed in regulation 36 for death benefit only; provided, however, that the said limit of fifty-two weeks in the aggregate of all disabilities by sickness shall be increased by one week for each year of full membership above four years, to a maximum of seventy-eight weeks.

If any member shall have drawn sickness benefits to the limit as above provided and shall have contributed for death benefit thereafter for at least six months and shall, while so contributing, pass a satisfactory medical examination, he may, upon the approval of the superintendent, be restored to full membership; except that, in the event of disability from sickness, he shall be entitled to benefits at half rates only, for twenty-six weeks in the aggregate of all disabilities by sickness, and thereafter shall only be entitled to contribute for death benefit as above provided.

52. In any case of grave injury or chronic sickness where the member desires to accept a lump sum in lieu of the benefits which might become due to him or on his account, and in full of all obligations of the Department or Company arising from his membership or service, the superintendent shall have authority to make full and final settlement with such member on such terms as may be agreed upon in writing. All such settlements shall be reported to the committee at their next meeting.

32 53. Benefits on account of continued disability will be paid monthly. Benefits for short periods of disability will be paid as soon as the amounts due can be ascertained.

Benefits payable on account of the disability of a member shall be payable only to such member, or in accordance with his written order when approved by the superintendent, or to his legal representative; but payment for surgical treatment may be made to the attending surgeon.

When in the opinion of the superintendent a member is mentally incompetent, disability benefits due to him may, at the discretion of the superintendent, be paid to his wife or to some member of his family or to his employing officer, for the use and benefit of the member, and such payment shall be a bar to any subsequent claim on the part of the member or his legal representative for amounts so paid.

54. Death benefit, together with any unpaid disability benefits, shall be payable to the beneficiary of a deceased member upon proof

of claim and execution and delivery of the necessary releases in conformity with regulation 64.

A part of the death benefit, not to exceed one hundred dollars (\$100), may, at the discretion of the superintendent, be paid before final settlement, to meet funeral or other urgent expenses incident to the death of a member.

Miscellaneous.

55. When a member becomes disabled he shall notify his time-keeper immediately, or cause him to be so notified. In reporting disability the member shall also give his house address. If he fails to give notice until he recovers he shall not be entitled to benefits unless he proves his disability to the satisfaction of the superintendent, and gives satisfactory reason for failure to give notice. If he gives notice during his disability, but delays in so doing, he shall not be considered disabled before the day on which notice is given, unless he proves his disability before that day to the satisfaction of the superintendent, and gives satisfactory reason for delay in giving notice.

33 When a member becomes disabled it shall also be his duty, unless incapacitated therefrom by his inability, to report immediately in person to the medical examiner at his office during office hours, if the member resides or becomes disabled in or goes to a town where there is a medical examiner; it shall also be the duty of a disabled member not confined to the house by disability, to report at the medical examiner's office from time to time, as requested, and to keep any other appointments made by the examiner. Members who avoid the medical examiner, or neglect to report or keep appointments as herein provided, shall not be entitled to benefits.

If a member, who has been reported by the medical examiner as able to work, is not able to work on the day set, he shall immediately notify his employing officer to that effect and shall immediately communicate with the medical examiner, and report to him in person if possible, otherwise he shall not be considered disabled on or after the day set for his return to work.

* * * * *

58. Members shall not be entitled to benefits for time during which wages are paid them by the Company. In computing benefits, the time of disability shall be considered as beginning upon the first day upon which no wages or less than one-half day's wages are paid, because of disability, and this day shall be called "first day wages not paid."

59. Benefits shall not be payable for disability directly, indirectly or partly due to intoxication or to use of alcoholic liquors as a beverage, or to immoderate use of stimulants or narcotics, or to unlawful acts or immoralities, or to venereal disease however contracted, or to the results thereof, or to ureth-itis, orchitis, epididymitis, stricture, or glandular swelling or abscess in the groin, however caused, or to fighting, unless in self-defense against unprovoked assault, or to other encounter such as wrestling, scuffling, fooling and the like, or to in-

jury received in any brawl, or in any liquor saloon, gambling house or other disreputable resort.

During disability coming under this regulation a member shall contribute for and be entitled to death benefit only.

34 Death benefit shall not be payable in case of death due directly or indirectly to unlawful acts or at the hands of justice.

60. Members shall not be entitled to benefits if they decline to permit the medical examiner to make or to have made by any other physician, such examinations as he may deem necessary to ascertain their condition when disability is claimed.

Disabled members must take proper care of themselves and have suitable treatment; benefits will be discontinued if members refuse or neglect to comply with the recommendations of the medical officers of the Relief Department as to proper care and treatment.

61. Unless a member previously arranges with the superintendent for absence in foreign lands, benefits shall not be paid on account of disability or death occurring at any place beyond the jurisdiction of the United States.

62. Benefits shall be paid in conformity with the financial methods of the Company, and on orders drawn by the superintendent, upon his receiving satisfactory certificates respecting the claims and such releases as may be required by him.

Any claim for disability benefits, to be valid, must be made within sixty days from the time when such benefits accrued, and any claim for death benefit, to be valid, must be made within two years from the death of the member.

63. Members shall keep their foreman or timekeepers informed of their addresses.

A member's place of residence when on duty shall be held to be the last address given to his timekeeper.

Members who have left the service, but retain their membership in respect of death benefit only, shall keep the superintendent informed of their addresses by notice in writing, and the superintendent shall promptly acknowledge notification of any address or change of address.

64. In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the Company or any Company associated therewith in the administration of their Relief Departments.

35 The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the Company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent, of all claims against the Relief Department, as well as against the Company and all other companies associated therewith as aforesaid, arising from or growing out of the death of the member, said releases having been duly executed by all who might legally

assert such claims; and further, if any suit shall be brought against the Company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the Company created by the membership of such member in the Relief Fund shall thereupon be forfeited without any declaration or other act by the Relief Department or the Company; but the superintendent may, in his discretion waive such forfeiture upon condition that all pending suits shall first be dismissed.

The payment by the Company, or any Company associated therewith as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member, shall preclude any and all claims for benefits from the Relief Fund arising from or growing out of such injury or death.

65. In any controversy, claim, demand, suit at law or other proceeding between any member, his beneficiary or legal representative and the Company or the Relief Department, the certificate of the superintendent as to any facts appearing in the records of the Relief Department or of the company, or that any writing is a copy taken from said records or of any instrument on file in said Department or with the Company, or that any action has or has not been taken by the committee or the board of directors of the Company, shall be *prima facie* evidence of the facts therein stated.

36 36. All questions or controversies of whatsoever character arising in any manner, or between any parties or persons in connection with the Relief Department or the operation thereof, whether as to any claim for benefits preferred by any member or his legal representative or his beneficiary or any other person, or whether as to the construction of language or meaning of the regulations, or as to any writing, decision, instruction or acts in connection with the operation of the Department, shall be submitted to the determination of the superintendent, whose decision shall be final and conclusive thereof, unless an appeal from such decision shall be taken to the committee within thirty days after notice of such decision to the parties interested.

When an appeal is taken to the committee it shall be heard by said committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties without exception or appeal.

EXHIBIT "C."

*Notice of Application for Membership or Change in Membership,
No. 59267.*

Centerville, Ia., 11-19, 1900.

Name, C. L. McGuire.

Age, 28 years.

Wages per Mo., \$60.

Application to take effect Nov. 20, 1900.

Occupation, Brakeman.

Application for Membership in Class 3.

I hereby give notice of application, in accordance with the foregoing, for membership in the Relief Fund of the Railroad or Railway Company by which I am now employed. I agree to be bound by the Regulations of the Relief Department of said Company, and especially by Regulation 49.

I fully understand that this Notice of Application will only entitle me to benefits on account of accident, in accordance with Regulation 49, and will not entitle me to benefits on account of sickness, or death caused by sickness or disease.

C. L. McGUIRE.

37

EXHIBIT 1.

Burlington Voluntary Relief Department. No. 19253.

CHICAGO, Jan. 8, 1901. \$46.50.

Pay to the order of C. L. McGuire, Forty-six and 50-100 Dollars, and charge to the Relief Fund of the Chicago, Burlington & Quincy R. R. Company. This amount is in payment of accident benefits for 39 days from Dec. 1st to 31st, 1900, inclusive, and is paid and accepted under the Regulations of the Relief Department.

[Rev. stamp.]

To the Treasurer of the C. B. & Q. R. R. Co.

Payable at the Commercial National Bank, Chicago.

J. C. BARTLETT,

Superintendent.

Exhibit 2 is dated February 2d, 1901, and is for \$46.50, being benefits for January, 1901.

Exhibit 3 is for \$42.00, and is for benefits for February, 1901.

Exhibit 4 is for \$46.50, and is for benefits for March, 1901.

Exhibit 5 is for \$45.00, and is for benefits for April, 1901.

Exhibit 6 is for \$46.50, and is benefits for May, 1901.

Exhibit 7 is for \$45.00 and is benefits for June, 1901.

Exhibit 8 is for \$46.50, and is benefits for July, 1901.

Exhibit 9 is for \$46.50, and is benefits for August, 1901.

Exhibit 10 is for \$45.00, and is benefits for September, 1901.

Exhibit 11 is for \$36.00, and is benefits for October, 1901.

Exhibits 2 to 11 are in form exactly like exhibit 1.

EXHIBIT 12.

CHICAGO, Feb. 14, 1901.

Pay to the order of Mercy Hospital, Des Moines, Ia., Fifty-Eight Dollars, and charge to the Relief Fund of the Chicago, Burlington & Quincy R. R. Company.

(Signed)

J. N. REDFERN,
Assistant Superintendent.

38 To the Treasurer of the C., B & Q. R. R. Co.

Exhibit "13" is for \$24.50, payable to Mrs. A. E. Long, and is for services rendered in taking care of Appellee.

Exhibit "14" is for \$248.00, payable to Dr. J. L. Sawyers, and is for surgical services rendered Appellee.

All the above checks were properly endorsed by the payees thereof, and were paid during the year 1901.

Amended Answer.

On the 25th day of April, 1903, the appellant, the Chicago, Burlington & Quincy Railroad Company, filed in said court an amendment to its said answer filed on the 13th day of February, 1902, which said amendment is in words and figures following, to-wit:

Now comes the defendant, the Chicago, Burlington & Quincy Railroad Company, and by leave of Court, files this, its amendment to the answer filed by it on the 13th day of February, 1902, being amendment to Count No. 3 of said answer, and it says, as an addition to said count, that it had a right to make the contract with plaintiff, which it pleaded in said count as an accord and satisfaction and release; also says that said contract was made and the plaintiff accepted said contract and enjoyed the benefits thereof, and defendant says that it is not barred of its right to plead said contract by Section 2071, Code of the State of Iowa, as amended March 8, 1898, nor by any of the provisions of said section and amendment which said section as amended attempts to invalidate contracts of the character pleaded by defendant and to bar this defendant from the benefits of said contract. Defendant avers that said section is void as being in contravention to the Constitution of the United States, and that said section is contrary to the Constitution of the United States, especially Article 14 to the amendments to said Constitution; and says that said section as amended is void for the reason that the same attempts to deprive this defendant of the right and liberty secured by said Constitution and said amendment of said Constitution to make private contracts; and also because said section as amended attempts to take from the defendant its liberty to make such contract without due process of law, and because said

39 Section 2071 thus amended attempts arbitrarily to deprive this defendant of its right to make the said contract pleaded

and set forth in said count of defendant's answer, and also because said section as amended attempts to deprive it of its equal protection under the laws of the land in violation of the plain provisions of said Article 14, commonly called the 14th Amendment to the Constitution of the United States. Said defendant also in like manner says that Section 2071 as amended is contrary to the Constitution of the State of Iowa, and is void, and of no effect, rendered so by the plain provisions of the Constitution of the State.

The defendant reaffirms all the allegations set out heretofore in said count and pleading as an accord and satisfaction and release of plaintiff's claim, and asks to be dismissed with its costs.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, *Defendant*,
By H. H. TRIMBLE AND
F. S. PAYNE, *Attorneys*.

On the 31st day of March, 1902, an agreement was filed in said court, signed by counsel, which agreement is in words and figures as follows, to-wit:

"It is hereby stipulated and agreed by the above named defendant that in case a judgment in the above action is rendered against the Chicago and Quincy Railroad Company, in said cause, that said judgment shall go also against the Chicago, Burlington and Quincy Railway Company also."

On the 31st day of March, 1902, the Chicago, Burlington and Quincy Railway Company entered an appearance, which appearance is in words and figures following, to-wit:

"Comes now the Chicago, Burlington & Quincy Railway Company and enters its appearance in the above entitled action, and stipulates and agrees that in case judgment is rendered in said cause in favor of the plaintiff and against the Chicago, Burlington & Quincy Railroad Company, the same judgment may go against the Chicago, Burlington and Quincy Railway Company also."

On the 7th day of May, 1903, the following agreement was signed by counsel and in said court, which is in words and figures following to-wit:

"For the purpose of facilitating a settlement of the question of the constitutionality of the so-called Temple Amendment, it is agreed in the above entitled cause that defendant will withdraw the first and second counts of the defendant's answer, including the amendment to said third count filed during the month of April, 1903, and should the Court overrule said demurrer and render judgment against plaintiff for costs, then it is agreed that plaintiff may appeal the case from said judgment, and should the case be reversed by any Court to which it is appealed and be returned to the District Court of Appanoose county for trial, then defendant shall have a right to re-file the first and second counts of its answer before any re-trial of the case.

C. F. HOWELL & C. H. ELGIN,
Attorneys for Plaintiff.
H. H. TRIMBLE,
Attorney for Defendant."

Demurrer.

On the 8th day of May, 1903, the appellee, Charles L. McGuire, filed a demurrer to appellants' first amended answer and amendment to said answer, which demurrer is in words and figures as follows, to-wit:

Comes now the plaintiff, by C. F. Howell and C. H. Elgin, his attorneys, and demurs to defendant's amended answer filed February 13, 1902, and defendant's amendment to said amended answer, filed April 25, 1903, and shows the Court the following grounds, therefore, to-wit:

(1) That the facts set out in said count three of said amended answer, to which this demurrer is made and said amendment thereto which facts it is alleged, are a bar to the plaintiff's right to recover in this suit and which are alleged to be an accord and satisfaction and release by plaintiff of his damages against defendant railroad company and his right to recover the same, do not constitute such bar, release and accord and satisfaction, for it is not alleged that plaintiff made any settlement with the defendant railroad company after the injuries complained of, for the damages alleged to have been received other than the acceptance of accident benefits from the so-called "Burlington Voluntary Relief Department" referred to in said answer of which department it is therein alleged that the plaintiff was a member and that the acceptance of such benefits as alleged by the defendant in said pleadings as here demurred, after the injuries, would not constitute any bar or defense to the cause of action set forth in plaintiff's petition, wherein plaintiff seeks to recover for certain permanent injuries sustained by reason of the negligence of the defendant's railroad company's employees in the operation of a locomotive, all as provided by the laws of the State of Iowa and especially the provisions of Section 2071 of the Code of Iowa and the certain amendment thereto contained in Section 1, Chapter 49 of the 27th General Assembly of the State of Iowa.

(2) That the so-called regulations of the so-called relief department as defined and particularly described and set out in said pleadings which said amended answer alleges to bind the plaintiff and do control as to his rights to recover in this case are invalid and null and void under the laws of the State of Iowa and especially the portions of the statute set forth in paragraph one hereof.

(3) That that portion of Section 64 of said so-called regulations of said relief department set forth in said count three of said amended answer which provides that the acceptance by a member of said relief provided for in said regulations of said department on account of injuries sustained shall operate as a release and satisfaction of all claims against said defendant railroad company and the other associate companies therein referred to, for damages arising from or growing out of such injuries is invalid, contrary to law and especially contrary to the particular sections of the statutes referred to in paragraph one hereof.

(4) That the particular clause contained in Ex. "C" attached to

said amended answer and a part of count three thereof wherein applicant, the plaintiff, states "I agree to be bound by the regulations of the relief department of said company," does not under
42 the laws of the State of Iowa conclude and determine the plaintiff's right to recover in this case, even though said applicant did accept the benefits provided for in said regulations after his injuries.

(5) That the plaintiff's petition alleges that the plaintiff received certain permanent injuries while engaged in the hazardous occupation of operating defendant railroad company's train and is totally disabled on account of such injuries caused by the negligence of said defendant's employees; that said defendant's answer, that is, the portions here demurred to, show that the plaintiff was a member of the relief department therein referred to and show farther that the plaintiff did never receive anything from said relief department to compensate him for any permanent injury or total disability and hence that there has been no settlement of the plaintiff's claim for damages on account of said permanent disability.

(6) Plaintiff in this suit is seeking to recover for permanent injuries and total disability caused by the negligence of the defendant's employees while operating a train; that defendant's said amended answer here demurred to shows on its face that there was no provision made in said so-called regulations for the payment of any substantial sum to the plaintiff or any member of said relief department on account of permanent injuries and total disability such as were sustained by plaintiff as is alleged and that therefore, the facts stated in said pleadings as to plaintiff's membership in said relief department and his acceptance of the sick benefits therein referred to would constitute no bar to the plaintiff's cause of action and would not be defensive thereto.

(7) That said count three, on its face, shows that the said relief department therein referred to was an association or department formed and organized for the purpose of defrauding and curtailing the rights of the defendant railroad company employees to recover substantial damages in any suit which they might thereafter maintain when injured while engaged in the hazardous occupation of operating a railroad; shows on its face farther that the said
43 department and the said so-called regulations under which the same was operated is unconscionable, against public policy and farther, that its maintenance is contrary to the letter and spirit of the law and especially to those portions of the statutes of Iowa referred to in paragraph one hereof.

(8) That said so-called relief department and its said regulations are void and against public policy because said regulations attempt to abridge and cut off any member's right to bring suit in any court or competent jurisdiction for any injuries sustained in the service of the defendant railroad company.

(9) That said department and said regulations are further void and against public policy because said regulations provide that the extent of the employee's injuries and the extent or the amount of accident benefits or damages to which he is entitled under said regulations shall be left and decided wholly by the medical examiner of

said relief department from whose decision there is no appeal or other relief allowed.

(10) That because of all the foregoing plaintiff states that the facts stated in the said count three and the amendment thereto do not entitle the defendant to the relief demanded.

HOWELL & ELGIN,
Attorneys for Plaintiff.

Which said demurrer came on for hearing on the 9th day of October, 1906, and the same was by the Court sustained, to which ruling and action of the Court the defendant then and there excepted.

Record Entry.

On the 9th day of October, 1906, the Court made the following order and record entry, to-wit:

Be it remembered that on this 9th day of October, 1906, it being the 20th judicial day of the September, 1906, term, this cause came on for hearing and pursuant to the order and decision of the Supreme Court, the demurrer filed May 8, 1903, to defendant's 44 & 45 amendment to answer filed February 13, 1902, is sustained including allegations made and incorporated in former answer relating to the relief department to all of which defendant excepts and the defendant is permitted to re-file the first and second counts of the original answer, pursuant to the stipulation of counsel in the case and which is accordingly done and the defendant selects to stand upon their pleadings, demurred to by plaintiff and refuses to further plead and excepts to all rulings of the Court and is given thirty days to prepare and have filed bill of exceptions.

That on said day, to-wit, the 9th day of October, 1906, the defendants, now appellants, re-filed the first and second counts of its said answer filed in said Court on the 13th day of February, 1902.

On the 9th day of October, 1906, at the regular September term of the court, this cause was regularly called for trial. Hon. Robert Sloan was the presiding judge. A jury was empaneled and sworn. Opening statements were made by counsel. The introduction of evidence was commenced and continued from day to day, until completed.

The evidence in the cause was taken in shorthand by R. W. Smith, official reporter of the court, and his report of the evidence was filed in the cause October 20, 1906, certified to by said reporter and Robert Sloan, judge of the court, and was duly incorporated in a bill of exceptions filed in the cause. The said evidence so taken, and the exhibits, documentary evidence and written testimony therein referred to, is all of the evidence introduced on the trial of the cause. The offers of evidence, questions asked, objections thereto, rulings by the Court, and exceptions of appellants to such rulings are each and all correctly stated and shown in said report of evidence. The translation of the shorthand notes of said evidence, duly certified by said reporter and judge, has been duly filed in this cause. The said evidence is set forth as shown hereafter in this abstract. B.

Evidence for Appellee.

* * * * *

46 CHARLES L. McGUIRE, plaintiff, sworn, says:

47 I was working November 30, 1900, for the defendant. I was injured at Prole, Iowa, about sixteen miles from Des Moines, on defendant's road. I think we had eleven to thirteen cars. About where the engine stood had a small down grade; back of it was almost level. The grade was to the north. Where the car stood there was some down grade towards Des Moines. I was hurt there. It was dark. I had a lantern burning brightly. Train was equipped with air. The engineer was Gene Gilbert. Just before I was hurt I was in the engine. That was the proper place for me. We were to leave some cars at Prole. That was the reason I told the engineer and head brakeman what I was going to do. I told Head Brakeman Benbow. I told engineer about pulling up to stop to clear the switch, cut off the engine and we would pull these stock cars in. I had charge of the switching. I was the hind brakeman. I told the engineer where to stop. He stopped at the place I told him to. The engineer knew where I was. I told him what I was going to do. He could not help but see me at the back of the engine. I told him what I was going to do. I just got off the engine and had a lantern in my hand. I told the brakeman of the fact that I was going in between the cars. He was standing about midways of the engine, just a little north of where the engineer was. He had a light in his hand. I had a light in my hand when I went between the engine and car. The first thing I did when I went between the engine and car was to turn the angle-cock of the engine. I was on the right hand side and the angle-cock was on the right hand side. The engine was headed north. I got off on the east side. There is an air hose that runs on the outside of the engine, goes to the back end of the engine. The angle-cock is at the back end of the engine, under the draw-bar, or within a few inches of the draw-bar. The angle-cock of a car is under the draw-bar, or within a few inches; the angle-cock of the engine cuts it off; the angle-cock of the car cuts the engine off. This draw-bar business comes between the engine and the car.

Q. How is this dead wood ordinarily equipped?

A. Where the shoulder of the draw-bar comes they have got a steel plate that goes right, facing on this side. Steel plate
48 coming along here for the shoulder of this draw bar to bump against when the slack is out.

I reached under the draw-bar. When I could not turn from underneath the draw-bar, I reached over. The engineer, after I reached over and undertook to turn this, the engine came back. I do not know whether he moved it, or whether it moved itself; the engine came back. The air was set on this train. It was stationary. It could not be moved. The train did not come up on me. I am sure, I am positive of that. Told them there that night what hurt me. At that time the engineer said the brakeman did not give him any signal and the engine came back on shoulder of the draw-bar across

here; that is about three inches high, or such a matter, is supposed to catch this again and keeps it from going back any further. This deadwood plate I don't know whether it ever had one on, but I suppose at one time it did, but it was gone. That had bumped and battered and beat this dead wood back about three inches; just caught me there.

Q. The deadwood proper went back into the deadwood about three inches when he came back?

A. Yes, into this four-inch piece.

Q. The shoulder went into this timber called the deadwood?

A. Yes, sir, it went back about three inches.

Q. If I understand, you didn't notice this scooped out place in the deadwood until after you was hurt, I understand?

A. After I was fastened right in there.

Defendant objects to this if it is sought to be used as evidence of negligence on the part of the defendant, there is no such allegation of any such defect in the machinery.

Overruled and excepted to.

Q. Until after you was hurt?

A. No, sir.

Q. Where was your lantern?

Defendant objects to the preceding question and answer (fourth answer back)—about the scooped-out, battered, worn timber; there is no allegation as to defective condition of any part of the machinery.

49 By the COURT: I don't admit it upon the idea it shows a defect. Overruled and defendant excepted.

Q. Where was your lantern?

A. Setting on top of this—on top of this timber, car timber.

Q. Time you were reaching under or reaching over?

A. Time I was reaching over.

Q. At the time you was squeezed, before or after?

A. After; before also.

Q. Was it plain to be seen, by the aid of your lantern, the condition of things?

A. Yes.

Q. I don't know as the jury have the thing clearly in mind. When you first went between the cars the air was set on the train, you say?

A. Yes.

Q. Also the engine?

A. Yes.

Q. Now, when you released this angle-cock on the engine—

A. I turned it crossways.

Q. Then what became of the air in the engine?

A. Engineer released his air.

Q. Engineer released his air in the engine?

A. Yes.

Q. Did it give ahead and stop or commence immediately backing?

A. No, it stopped.

Q. When the engineer had gone ahead, after he released the air in the engine, did that or not give you room for your body between the deadwood on the tender and this buffer here?

A. Yes, I was leaning——

Q. Why did you go over, reach over the coupling here to turn this angle-cock on the car on the other side?

A. Because I couldn't get it from underneath; the simple reason was the angle-cock was standing about that high above the joint angle; this one was bent down tight against it. I couldn't
50 get hold enough there underneath to turn it and push it around. Couldn't get purchase on it; handle it that way; it was smashed down.

A. No, not from below.

* * * * *

Q. After you found you couldn't turn the angle-cock by reaching under, it being bent down, what did you do then?

A. Raised up and reached over.

Q. Did that take your body between the draw-bars where the couplings were at all?

A. No.

Q. Then what became of you as you were reaching over; what movement, if any, was there on the part of the train or engine as you was reaching over to get this angle-cock?

A. The engine moved back.

Q. That time you went between that, reached over the draw-bar to uncouple that angle-cock on the other side of the links or draw-head, did you expect the engine would move until you got out from between the train?

A. No.

Q. What do you say was the practice, custom is, where a brakeman goes in between cars, engine and the car was stationary, stopped, if he goes between as to whether the cars are moved for any purpose, or engine, until he come out again?

A. Well, when a man, engineer, knows a man is between the engine he isn't supposed to move the engine, train, from a signal from anybody unless he sees this party come out, or the fireman sees him from the other side.

Q. You mean in ordinary practice?

A. I mean that is the practice always.

Q. Now where brakeman goes between the engine and car, and they are stopped, stationary, what is the practice as to whether signals are given to move those cars or engine until he comes out.

A. They are very often given.

Q. Is it practiced though to move those cars or engine,
51 give signals to move the engine or cars, generally practiced, until the man comes out from behind the tender, is it?

A. No.

Q. Now as to who gave the signal, whether any signal was given

to move that engine up on you, do you have any knowledge personally of your own?

A. No.

Cross-examination:

It is slightly down grade at that point, extending south four or five car lengths. The grade from the point where this down grade ceased was about level. We had five that was loaded; might have been more. I think the loaded cars were about the middle. There were some empty stock cars at the front end of the train. I think they were all air cars, except two. They were all close to the engine. There was a deadwood on the tender and there was one on the car next to the tender. The tender, also the north end of car next to the tender, each had a deadwood on about four inches through which sets on the edge about eight inches this way; I expect about two feet this way. I never measured one. I mean four inches thick, measured horizontally. I mean they are about eight inches deep from top to bottom and about two feet long. They were bolted on to the car and also on to the tender. There is what I call an angle-cock on the tender and one on each end of the car that has air on it. The angle-cock on the tender was right under the deadwood, and on the west side of the deadwood on the car. The angle-cock was on the west side of the car at the north end and about six inches from the center of the draw-bar so that this angle-cock would be pretty near on the level west of the center of the draw-bar of that car, or is a little bit close to the top; the draw-bar comes to the bottom of the car and angle-cock is fastened right on to the bottom of the car, clamp that holds it probably couple inches below. It is made of iron; it is fastened on to the end of the car by some kind of fastenings. It is in the bottom of the car at the end. It is fastened below the deadwood. It is fastened to the sill of the car. The deadwood is two feet long.

52 It is bolted on to the end of the car, and the bottom of the deadwood comes down to the bottom of the car. If you go from the coupling up you would strike the center of the deadwood. The angle-cock has an elbow in it, and the piece you take hold of to turn the angle-cock is parallel to the end of the car. Comes out perpendicular, turns down, and comes out at right angle. You take hold of that part that turns down, kind of a handle. Take hold of that in order to handle air; that is the business of the angle-cock. The angle-cock is on the east side of the deadwood on the tender. They were patent couplers; automatic. The coupler on the stock car was a Janney. The coupler on the engine was a Buckeye.

I left the rear end of the train before I got to Prole. When the engine stopped at Prole I was on the engine. Yes, the hind end of the engine was just about clear of the south switch. The switch is the end of the side track, on the east side of the main track. I should judge it is about fifteen or sixteen cars from the south end to the north end of the switch. There were some cars on this switch. The object to cut the engine off was to run up the main line. Beyond the north switch and back in on the side track through the north switch. I told the engineer to cut off the engine. I told him I would go

down; Sheffler had said to pull them in; go down and come out the north switch through the side track. I said, "I will cut off the engine, and you can go through the north switch." I got out on the east side of the engine to cut off the engine. I know I turned the angle-cock on the engine before I went in. I went in to cut off the engine. It is a part of my business to cut the air. I had to do that before I cut off the engine. Sometime during that time the engineer released the air on the engine; released it just after I turned the angle-cock; he released it while I was trying to turn the angle-cock on the car from underneath. I went in to cut the engine and thought it was necessary to turn the angle-cock. I first reached under. I could not turn it from underneath on account of it being bent down. It should stand about a half inch out to clear this air hose, but this one had been mashed down again it, I suppose. I know it was down; I do not know what done it. It pointed the same direction it ought to point. It angled straight down. The thing bent straight down. I used my right hand. The point of that angle-cock below the top of the draw-bar is, I expect, about six inches. When I put my hand under there I could not get hold of it so I reached over the draw-bar; the draw-bar is about six inches from the top to the bottom. When I reached under I could not move it on account of some mashed condition or changed condition, then I reached over the top. The point had been bent down against the hose tight.

Q. How much space was there between the two deadwoods as the engine and car stood there when you first went in?

A. A foot or a foot and a half.

Q. Did the engineer release his air while you were in there?

A. Yes.

Q. Did you hear the noise?

A. Yes.

Q. What were you doing when the noise commenced?

A. Was trying to turn angle-cock from underneath.

I heard the noise commence. I didn't do nothing. I tried to turn the angle-cock from underneath, raised up and reached over. I heard the air being released when I was trying to turn the angle-cock from underneath. It was necessary for the engineer sometimes to release his air.

Q. If you succeeded in turning the angle-cock on car before the air was released, what effect would that have had on the train beyond all the part of the train consisting of cars?

A. It would have had no effect.

Q. Wouldn't have had any effect at all?

A. No.

Q. Wouldn't set the brakes?

A. No.

Q. Wouldn't keep them set?

A. Not on the car.

Q. If you turned the angle-cock before the engineer has released his air, would it not have set the brakes on the cars?

A. Why, they would have eventually set if they hadn't been set

54 the time the train was; if they had been set at the time the train was he couldn't have released it. If they hadn't they would have eventually set in the course of a minute.

I turned the angle-cock on the engine before the air was released. No, I did not set the air on the engine. Had nothing to do with it. Did not hold the air. It would hold it back on the train; it would hold it on the engine. After I turned the angle-cock again the engineer could not release the air on the engine. He could not release the air on the cars.

Q. So that, Mr. McGuire, it was necessary to release the air, for the engineer to release the air on the cars, or release the air rather, before the angle-cock, either one of them, was turned?

A. I don't know whether it was or not.

Q. You know now, don't you?

A. No.

Q. Don't you know now that the engineer, if he wanted to release all the brakes on that train, he would have to release his air before the angle-cocks were turned?

A. Yes, but he had no business releasing the air on that train.

Q. Your idea is, it was proper to have the brakes set on the train?

A. O, no, it wasn't any more proper than to have left them off.

Q. If you turned the angle-cock on the engine, or the angle-cock on the car, either one, he couldn't release the brakes on the car now—

A. He had no control back of the angle-cock I turned; he had no control of the air back of the angle-cock I turned.

Q. After you turned the angle-cocks he couldn't control it?

A. He could not set it, release it or nothing.

Q. Couldn't do anything.

A. No.

Q. If you had succeeded in getting the angle-cock on the engine, or the angle-cock on the car turned before he released his air, then he couldn't have released.

55 & 56 A. No, I done had him shut off before I went in there between the cars. He had no control of the air before I went in except on his engine.

Q. Then you, first thing you did was to turn the angle-cock on the engine.

A. Yes.

Q. Was the air released on the engine before you turned it?

A. No.

Q. It was released after you turned it?

A. Yes.

Q. How could he release the air after you turned the angle-cock?

A. That's all up to him; all you have got to do, put the bottom of the valve on the lapse; it releases itself.

Q. If you turned the angle-cock on the engine before the air was released then the air would be set on all the cars?

A. Yes.

Q. And the brakes would be held?

A. Yes.

Q. Don't you know, in point of fact, he released the air and all the brakes was loose before ever you got hurt?

A. No, sir.

Q. Don't know that?

A. No, sir, I know that the brakes was all set when I was hurt.

Q. All set when you got hurt?

A. On the cars that had air on.

Q. Do you know how many had air?

A. About seven or eight.

* * * * *

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E. E. Bryan.

Been brakeman eight years; worked on Wabash; worked with air brake; know how it is controlled in the operation of brakes on train. If angle-cock is bent down you reach over to turn it, you can push it harder; train is not supposed to move ahead or back when man goes between until he is seen coming out again, not according to the general practice. No signals should be given till he comes out.

The draw-bars have big iron shoulders that bump against the deadwood, and the draw-bar has an iron plate on it that protects it when the draw-bar strikes against it.

The engineer has no control over the air in the train when the angle-cock is shut on the engine.

Cross-examination:

Angle-cocks are different lengths; I say if I couldn't turn the angle-cocks from underneath, I would reach over, when you want to turn the angle-cock on the opposite side you push it; if it is bent down and rest on pipe and you want to turn it, it is not easier to turn it by catching hold of lower end; you can't get hold of lower end if it is against pipe, if it was bent down on pipe all way, you would just shove it wherever you could get hold of it.

Air brakes are always set when — stop freight train at station, so that train won't start. I would catch hold of the lower end of the angle-cock. It gives you more leverage; you can turn it easier from lower end than catching it from the upper end. The farther it is from the place it is bolted, the easier you can turn it.

* * * * *

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Defendant's Evidence.

E. S. GILBERT, sworn, says:

I am a locomotive engineer, and have been such since 1897. I have been railroading since 1888. I worked in shops, then fired engines. I continued to work as an engineer up until 1900. I remember about Mr. McGuire's getting hurt at Prole. We had 13 or 14 cars. There were 7 or 8 cars with air brakes. There were six empty stock cars next to the engine; all air cars were next to the engine; we had some loaded cars and they were behind the stock cars. We arrived at Prole after dark. We had work to do

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at Prole; we had some cars to set out there. I think six empty stock cars. The side track is on the east side of the main track, at Prole. We stopped the train south of the south switch. We expected to cut off the engine and go down, back through the side track and pull them in. We would have to go just north of the north switch; then we back east to the side track, couple up the cars. The stock pens at Prole were located at the south end of the switch. McGuire came to the engine and told me what he wanted. He stood by my side and said: "Gene, when we get to Prole we will cut off and pull the stock cars in." Yes, he said, "cut off engine, go around and pull them in." When I stopped, the first thing I did was to release my air on the train. It is customary to release under such conditions when you have that kind of work ahead of you. The first thing I did after I released the air I tried to work with my injector. Oh, it takes no time at all to do this. Just a movement of the hand to release the air. I moved my hand two inches, possibly three, and take hold of the brake valve handle. You can move it with a simple twist of the wrist. It takes a second or two to do so.

A. I put the brake valve in the release within two seconds after the engine stopped, the brake valve was in the release.

Q. What effect would putting that valve in that condition have upon the air under the train, upon the brakes along on the train?

A. It would release the brakes, start the brakes to releasing.

Q. Tell me when you approached Prole, along back south, what you did to enable it to stop; what machine did you apply; what instrumentality did you apply to stop?

A. Why, I set the air-brakes to stop.

Q. How many brakes did you set? I understand that you had six or seven, maybe more cars, that had brakes on, air brakes?

A. Yes, sir.

64 Q. State whether or not the air brakes were all connected with the engine?

A. Yes, best of my knowledge they were.

Q. When you released the air, what effect did that have upon any of the air brakes in the cars, that had been set?

A. Why, it released the brakes that were set.

Q. State whether or not it would have the effect of releasing the air on every air brake which had been set, which was connected with the engine, every air brake connected with the engine.

A. Yes, it would release every air brake that was connected with the engine, that was set.

Q. So that, in point of fact, the air brakes connected with the engine, no difference how far they run back in the train of cars, are handled from the engine by the engineer?

A. Yes.

Q. State whether or not you can set all those brakes, way back as far as it is connected with the engine by this movement that you spoke of while you are on the engine.

A. Yes.

Q. What was the first thing you did after you released the air?

A. Went to getting the injector or trying to get her to work.

Q. What is the injector?

A. Injector is an instrument to put water in the boiler.

Q. Did that injector have any effect to move the engine that time; did it have any effect?

A. No.

Q. How long did you work at that injector and why did you work at it? First state how long you worked at the injector.

A. It was probably a very few minutes. I was trying to get my injector to work, getting it primed.

Brakeman Benbow came to the window of my cab and said: "Slack ahead, Gene, Charlie is caught." I was trying my injector; the injector is outside of the cab on this engine. My head was leaning out, looking down, watching the water come out of the overflow, my hand reached up on the injector throttle; it was several feet down to the injector on the outside. Benbow had a lantern and was standing, I should judge, about half way between the cab and tank on the east side of the train. When Benbow told me Charlie was hurt, I slacked ahead probably six inches. As I slacked ahead, he took hold of Charlie and helped him out. I stepped down off the engine and went down as quick as I could where Charlie was and laid him on the ground. I said, "Charlie, what is the matter?" and he said, "I am caught, the slack caught me." He said "Oh, if you had moved ahead a little quicker, not held me so long." I did not know who was caught until Benbow told me.

Q. Please state to the jury, after you released your air, any time between that and the time Mr. Benbow came to you, you moved your engine backward?

A. I did not, no, sir.

Q. State whether or not you moved the reverse lever at all?

A. I did not.

Q. From the time you stopped until Mr. Benbow came up?

A. No.

Q. State whether or not your lever was in the forward motion all this time?

A. It was.

Q. Now state whether or not there was any shock, and if so where, after you released your air, before Benbow spoke to you, and if so, what direction that shock came from? Whether any bumping of any kind, if so, where the bumping came from?

A. Yes, after we stopped, when I was trying to work my injector, there was a shock or jamming up against the engine before Benbow spoke to me.

Q. State what it was made the shock then? What caused that jam?

A. Something came against the rear of the engine.

66 Q. Do you know what it was?

A. Well, the train.

Q. Now, I will ask you to state about how many of those cars of that train were loaded, as near as you can remember?

A. There were probably six or seven cars that were loaded.

Q. Tell us which end of the train of cars they were found?

A. They were in the rear part, behind the empties.

Q. Mr. Gilbert, you have already said, as I remember, you stopped your train by the application of air brakes?

A. Yes.

Q. When you apply the air brakes in the same way you did that day, what effect has that upon the cars that have no air brakes on them?

A. Why, the effect would be that when the brakes are set on the forward air brake cars the non-air cars will bunch up against the air brake cars.

Q. When the train stopped under circumstances of that kind, and the air is released, what action takes place among the cars of the train, organized like that train was? That is to say, if there are any, what movement, if any, takes place after the air is released on that train, stops?

A. Well, when you apply the air, the non-air cars being bunched against the air brake cars they would materially spring back.

A. After you stop the train?

A. Yes, would be bunched up tight together when you stop, they would kind a roll back and the air brake cars would naturally kind a move back and forth according to—

Q. Tell the jury whether or not the couplers under the cars that you were using that day had springs attached to the rear end of them under the cars, of the couplers; on the couplers or draw-bars, whether they had springs at the rear end of them?

A. Yes, all cars have springs in the draw-bars.

Q. Springs behind the couplers or draw-bars?

Q. Now, when the cars are bunched together in the way 67 you explained awhile ago, then the train is stopped and—I am speaking of cars that have no air brakes on them set—and when the train is stopped what effect will those springs have upon the non-air cars that have been bunched together that way?

A. When the non-air cars are bunched together that way, the springs are compressed. After the train is stopped why the springs will come out, cars will run back.

Q. Taking say, seven cars, such as you think you probably had that day, that had no air on them, and you apply the brakes, and the effect of that application is to bunch those non-air cars; take the middle car, suppose there is seven, take the middle car, what direction would the concussion of the springs have on the other cars on each side of it?

A. In the non-air cars?

Q. Yes, you spoke of the effect of the springs on the center of the non-air cars; say the other cars on each side of it.

A. The spring will have a tendency to work both ways in itself.

Q. Mr. Gilbert, assuming those cars you had that day were in ordinary repair and condition, and you released the brakes on the cars next to your engine, all the brakes; how long would it take those brakes, after you had released them, to re-set by the leakage of air, providing the cars were in fair condition?

A. Oh, it would probably take several minutes for the ordinary, just the ordinary leak.

Q. Suppose they were in good repair?

A. They would stand a long while.

Q. How long?

A. Probably stand all day. Probably wouldn't set all day.

Q. Now state whether or not you knew any of the cars in your train being out of repair?

A. I did not.

Q. What do you mean by tagging it?

A. They have cars to tie on, defective air brake here, stating what was wrong with the car, why it was cut out, not in operation.

68 Q. You spoke about this bumping against the rear end of the tender. How long did that bump occur before Mr.

Benbow came up to you?

A. Perhaps a minute.

Q. State what effect the releasing of the air had on the movement of your engine? In other words, whether it moved it at all or not, what did it do when you released the air?

A. The engine was standing still when I released the air.

Q. When you released it what did the engine do immediately, the effect of the release? What did it do, if anything?

A. It would have the effect to move a little bit ahead.

Q. How many inches?

A. Oh, probably three or four inches. Just the spring in the tank draw-bar—

Q. Now from that on to the time Mr. Benbow came, what motion did the engine make?

A. The engine made no movement whatever, didn't move at all.

Q. How soon after you released the air until you commenced working with your injector.

A. Just as quick as I could possibly get to it.

Q. What was you doing at the moment you released the air, standing or sitting?

A. Sitting on seat box.

Q. State whether or not you moved your body, after you released the air, until you commenced working with the injector? Whether you got up, done anything else?

A. No, I just sat right still, commenced working, trying to work my injector.

Q. Was there any trouble from one of the injectors?

Q. No, sir, hadn't been.

After bump come, before Benbow came up it was, "O, probably, it was perhaps a minute," I don't think longer than a minute.

Q. A minute is quite a long time? Q. How many steps could you, would you probably have taken?

69 A. I could not tell, I don't know; I couldn't tell how far I would walk; I think it was fully a minute after I felt the bump; it was that long anyway before Benbow spoke to me.

Cross-examination:

I am still working for the company as locomotive engineer. I am next one scheduled for passenger engineer and certainly want it. I desire to retain the company's good will. I talked to attorneys for company about this case. I remember there were six air brake cars in the train. There might have been more. As we were pulling into Prole, Charlie came over the train into the engine and said, "We will pull those stock cars in." He did not tell me that there were certain stock cars to be pulled out at Prole on that siding. The conductor and brakeman have charge of the cars, and I have charge of the engine. The back end of the train was on the down grade very little. I was going to cut off the engine and take it a half mile north and leave the train stand still. When you leave a train on a down hill, it is proper practice to leave the brakes set on if you are going to leave it. If it is down hill enough so the train won't stand, it is proper to release the brakes; set either the hand or air brakes. Charlie told me, coming up the hill, before we got to Prole, we were going to cut off and pull the cars in. I think he told me before we whistled for town. -hen we stopped the engine I was not watching Charlie's movements. Was not watching movements of the fireman. Whether Charlie got off of engine just before or just after we stopped, I do not know. As to where Charlie went immediately after he stepped off the engine, I do not know. As to whether Charlie stepped back to where the angle-cock is on the engine and flipped it down, I do not know. If Charlie did step back to the engine and flip it down on the engine, the effect of the air would not be to release it on the engine. If air was simply released on the engine and not on the train, the engine would slack ahead; it would not move back. If Charlie did flip down angle-cock before I released the air that would leave the air brakes set on the train.

Q. As to whether the engine moved back or the train moved up, to be honest about it now, comparing this station to other stations back, to be candid? You don't have any more recollection than you would at any other station where the engine would move back or forward a little?

A. Yes, I do.

Q. Mr. Gilbert, if that engine, if the brakes were set on the train, if he flipped down the angle-cock, that you don't know whether he did or not, left the brakes set on the train, if you taken off the air on the engine, let the engine go forward a little, that would make it so he couldn't make the uncoupling until you moved back a little, wouldn't it?

A. If the draw-bars were pulled tight he couldn't pull them up.

Q. After the brakes were set on the train your engine did list forward a little?

Q. When the *the* brakes set on the train and the air off the engine, the engine moved forward, that would tighten up the pin, have a tendency to, so he couldn't pull the pin, wouldn't it?

A. Yes, if the engine moved forward.

Q. With the link tightened up against the pin, before he could

make an uncoupling, which you say you knew he was going to make, you would have to move your engine back a little.

Q. He would have to ask for the slack.

A. Yes.

Q. The real fact is, you did give him the slack before the accident happened?

A. I did not give him the slack.

Q. Take a train where there is no brakes set on it, and the train runs up, a little down hill grade, train runs up on the engine, and the engine brakes are not set, the train will shove the engine ahead, will it not?

A. If it strikes it hard enough it will.

Q. It will shove the engine ahead?

A. If it hits it hard enough it will.

Q. Was your engine shoved ahead that night?

A. I don't think it was shoved ahead very much. Might probably—

71 Q. Was it shoved any?

A. I don't remember it was shoved ahead any. I know something hit it.

Q. Was the brakes set on your engine?

A. No, sir, not when the jam came.

Q. You are sure it was a minute or two after you felt the bump, if you did feel any bump, before Benbow came up?

A. I said it was barely a minute.

I don't know why my interest in the case should affect my mind and memory as to some of the things I testify to. That is all the answer I desire to make. I have been told the claim is made I was negligent among other things. I don't remember what we did at the Rock Island crossing that night; remember we stopped, that's all; don't remember what we did at Wick, nor at St. Mary's; don't remember whether we picked up or set out a car there. No switching. Nor if Benbow came to engine or whether used injector. Never talked to Trimble or Payne about that. Remember nothing we did at St. Charles. There were 13 or 14 cars in train according to conductor's book; I saw it the other day. We were going to come back to train in four or five minutes, as soon as we could pull cars on siding north and come back and hitch on.

If angle-cock was flipped down and I released air on engine, the engine would probably move ahead to the extent of the slack. The effect, if engine moved, would be to increase distance between engine and car next to it.

If train stayed locked, the train would not have moved up on Charley while he was in there, it wouldn't.

If the angle-cock was flipped down and brakes set on train, and air taken off engine and it listed forward, it would tighten up the pin and before he could uncouple, he would have to ask for slack. That would call for me to reverse engine and move it back a little.

If train runs upon engine it will start it, if strikes hard enough. My engine was not moved any that night; brakes were not set. I

said it was fully a minute after bump came before Benbow came up. I know. I said it was a minute. I said finally it was fully a minute.

72 Redirect examination:

A. Mr. McGuire came over the train as we were on Prole hill. He came down on the engine, stood right by my side, and says, "Gene, when we get up to Prole we will cut off the engine, stop in the clear of the south switch, and if there is any cars in there, we will pull them in," just as near as I can remember.

Q. State whether that was all he said to you on that subject, business, that day to you, that time?

A. That's all I remember.

Q. State whether or not, after you stopped the engine, released your air, there was any signal given to you by either one of the brakemen to back.

A. No.

Q. State what your uniform custom is, what your uniform custom was about moving an engine after you stopped at a station, just as you did that day, about moving the engine unless you got a signal to move it?

A. We didn't move them unless we got our signal to move them.

Q. Who does that signal come from?

A. The brakeman or conductor.

Q. State whether or not you got a signal on that day after you stopped, and before Mr. Benbow came to you?

A. I did not get a signal.

Q. State whether or not you had any occasion to back your engine between the time you stopped and the time Benbow came to you?

A. I had no occasion to back the engine whatever.

Q. State whether or not the engine can be moved without using the lever? I mean after it stops, whether it can be moved backwards by you or by any act of yours unless you use the reverse lever?

A. No, sir, you have got to reverse the lever to move it backward.

Q. How much of a motion do you have to make when you undertake to back an engine? Suppose you wanted to back it a foot or two feet; what kind of a motion?

73-82 A. You have got to reach here, get your reverse lever, put it back in the back motion. Then give the engine steam.

Q. How much movement would your hand make in making that?

A. You see, that is—some engines the reverse levers probably farther than this.

Q. That engine you had that day?

A. I don't just remember. Must be close to four feet, that reverse lever, probably, from the forward motion to the back motion. That is, the top of the reverse lever, where the handle is. I judge that.

Q. State whether, after you stopped your engine that day, you ever took hold of the reverse lever until Mr. Benbow came to you and spoke to you, told you Charley was caught. Whether you took

hold of the reverse lever to move it from the time you stopped, up until Benbow came to you and spoke to you?

A. No, I didn't. The engine stood still. I had no occasion to move it.

Q. How long was it from the time you threw the engine forward, after Benbow spoke to you until you got out of the engine, went down where McGuire was?

A. It wasn't over a minute.

Q. Now, how far did you have to back where he was?

A. To back of tank.

Q. Was he laying on the ground when you got there?

A. I think he was kind a sitting, not laying clear out.

Q. What was it Mr. McGuire said to you, when you asked him how he got hurt? When you asked him what was the matter, what did he say? What was the language he used?

A. He says, "the slack caught me." He says, "O, if you had pulled ahead a little quicker. You kept me in there so long." Something like that—something to that effect.

* * * * *

83 WM. DAVIES, sworn, says:

I am a locomotive fireman. I was with McGuire when he got hurt, firing the engine. I remember where train stopped. The first thing I saw the engineer do after the train stopped was to put his injector in; that was done just as quick as we made the stop. It is located about half way on top of the boiler, right on the boiler, about four inches on the inside of the cab.

The engineer was sitting on his seat on the inside of the cab. He tried to put it on several times. It would take five or six minutes, maybe longer. Benbow came up after we stopped; the engineer was still working with his injector. From the time he commenced working with the injector up until Benbow spoke to him, he was trying to put his injector on, to put water in the
84 boiler. Benbow came up and told him to slack ahead that Charlie was caught. He did slack ahead and got off of the engine and went back to see. I stayed on the engine. I was working my injector. I don't think he had got his on yet. My injector is on the left hand side.

When you look out to see that the water is running, then you take the injector throttle and prime it. The engineer would look out, just glance out of the cab, on the right hand side of the engine. He was working the right hand injector; the water would come out about fifteen feet below his head. The engineer, if he wants to see if the water is flowing, would have to look out because the overflow is never in the cab.

Q. Now state to the jury, from the time he stopped his engine, up to the time Mr. Benbow came to him, spoke to him, what the engineer did, if anything, towards moving his engine backwards?

A. Why, he never moved it backwards, cause he wanted to move it ahead to let the brakeman out.

Q. I had more particular reference to what he did within the time

of stopping his engine, up to the time Mr. Benbow came? State what he did, if anything, in the way of reversing the lever, running his engine back?

A. He didn't do anything towards reversing the engine.

Cross-examination:

He did not do anything with his engine except the injector until Benbow came. I feel quite sure of that because he could not work the injector and reverse the engine at the same time. I was working the injector after we stopped. The injector is on the outside.

We stopped at Prole about ten feet south of the south switch. Don't know the first thing the engineer did. Some injectors are just below the cab, between drivers, don't know where this one was. It was forward of the tender in the direction of the cow-catcher from tender. Engineer, to be looking at discharge pipe, would not have to look towards tender, no, sir. He would have to be looking straight down or towards cow-catcher. Not towards first car. Would 85-99 not look over his shoulder to see it. It wouldn't take his eyes in direction of tender to look at overflow pipe.

I was working with my injector, it wasn't working good. My attention and thought was concentrated on it. I was not thinking about any accident of course.

I don't remember what the engineer did that day at Truro, New Virginia, St. Charles, St. Mary's or Wick. Am locomotive engineer now. I don't know how much the engine backed, no, sir.

Redirect examination:

Q. How did it happen you didn't get off the engine?

A. I was trying to put water in the boiler, trying to get my injector on still. Had a great deal of trouble with it, I remember.

Q. State whether or not you heard anybody say McGuire was killed while you were there on the engine?

A. No, sir, I didn't hear it.

Q. What was the language used by Benbow when he came up?

A. Why, he said, "Gene, slack ahead, Charlie is caught."

* * * * *

100 Be it also remembered that the Court at the close of arguments of counsel gave upon its motion the following instructions, to-wit:

1. This is an action by the plaintiff, Charles L. McGuire, against the defendant, The Chicago, Burlington & Quincy Railway Company, to recover the sum of two thousand dollars for personal injuries which he claims to have incurred by reason of the defendant's negligence while he was in the defendant's employ as a brakeman on a branch of said line running from Keokuk, Iowa, to Des Moines, Iowa, and through this county, and claiming that when he was so injured that he was exercising due care to avoid injury. The defendant disputes the claim of the plaintiff, and, the questions which you are to determine in the case are set forth in the following instructions:

2. The undisputed evidence in the case shows that the defendant is a corporation engaged in the operation, among others, of a line of railway from Keokuk, Iowa, to Des Moines, Iowa, which line passes through this town and county, and that for some time prior to November 30, 1900, the plaintiff was in the employ of the defendant in the train service of said company on said line as a brakeman, and that on the 30th day of November, A. D. 1900,

101 the plaintiff was working for the defendant as a brakeman on a freight train on its way to Des Moines consisting of fourteen cars including the caboose, and that a portion of the cars of said train were equipped with air brakes, and the cars so equipped were connected with the locomotive and in operating and running said train when they reached Prole, Iowa, which is a station on same line of railway not far from Des Moines; that the train stopped at said station for the purpose of leaving a portion of the cars of said train at said place and in so doing it became necessary to disconnect the cars from the locomotive for the purpose of doing said work, and, that to do so it was necessary to uncouple the front car from the locomotive tender and to disconnect the air brakes between them, and that the plaintiff went between the front car and locomotive for that purpose, and, while engaged in the performance of said duty the plaintiff was caught between the deadwood and the buffer on the front car while he was endeavoring to uncouple the air hose by turning the angle-cock of the air brake on the front car, and seriously hurt while so doing.

3. Now you are instructed that the defendant is not an insurer of the safety of its employes engaged in the train service on its railway while engaged in the discharge of its duties, and that the plaintiff in engaging in the service of the defendant assumed the risks thereof which are ordinarily incident to his employment, but defendant is only liable therefor when such injuries are caused by the negligence of the defendant to which the employe has not himself contributed by his own negligence, and, hence, the burden rests upon the plaintiff not only to prove negligence on the part of the defendant as claimed, to prove that he was not himself guilty of negligence which contributed to his injury in order to entitle him to recover therefor. The plaintiff does not assume the risks which are the result of negligence of the company through its employes.

4. The plaintiff, however, claims that the defendant was guilty of negligence in the following respects, to-wit:

First. That the engineer in charge of the locomotive hauling said train to its destination was negligent in moving said
102 engine backwards while the plaintiff was between the tender of said locomotive and the front car of the train engaged in making said uncoupling, when, it was the engineer's duty to have maintained it at a standstill until he had completed the uncoupling and come from between the same.

Second. That the defendant's engineer was also guilty of negligence in loosening the air brakes on said train before the plaintiff had got out from between said tender and the front car.

5. Now, you are instructed that the burden is upon the plaintiff

to prove that the defendant was guilty of negligence through said engineer in one or both of the above respects, and that such negligence caused the injury, in order to entitle him to recover, and this he must prove by the weight or preponderance of the evidence affirmatively.

6. The burden is also upon the plaintiff to prove that he was not guilty of negligence which contributed to the injury which he must establish by the weight or preponderance of the evidence, and, if he has failed to do so, or, the evidence thereto is equally balanced, then, you will return a verdict for the defendant, even though you find the defendant was, also, guilty of negligence.

7. Negligence is the want of ordinary care, skill and prudence, and ordinary care, skill and prudence is such care, skill and prudence as an ordinarily careful, skillful, and prudent person would exercise under like circumstances, and a failure to exercise such care, skill, and prudence as an ordinary, careful and prudent engineer would exercise under like circumstances would constitute negligence.

8. The care which the defendant's engineer is required to exercise in the discharge of his duties in the management and control of his locomotive should be commensurate with the known danger to the brakeman in the discharge of the duties which he is about to perform with his knowledge; not that he is required to exercise more

103 than ordinary care, skill and prudence, but in determining what is ordinary care, skill and prudence in the discharge of his duties the danger to be guarded against to the brakeman is an important element to be considered, and, ordinary skill, care and prudence is such care, skill and prudence as an ordinary careful, skillful and prudent engineer should exercise in view of the known danger to the brakeman making the uncoupling and disconnecting the air.

9. You are therefore instructed, that, if you find that the defendant's engineer knew that the plaintiff had gone between the tender and front car of said train to uncouple the same at that point, and disconnect the air brakes, and that ordinary care, skill and prudence on his part as an engineer required him to maintain said locomotive at a standstill until the plaintiff had completed the same, and came out from between said cars, and he failed to do so, but negligently caused or permitted the same to move back upon the plaintiff while he was engaged in making said uncoupling, and you further find that by reason thereof, the plaintiff was caught between the deadwood on the tender, and the buffer on the front car, then this would constitute such negligence as would entitle the plaintiff to recover for such injuries, unless he was guilty of contributory negligence as explained in these instructions.

10. The engineer is held to know that which in the exercise of ordinary care, skill and watchfulness in the discharge of his duties and the management of his locomotive he would have discovered and ought to have known.

11. If you find from the evidence in the case that the defendant's locomotive did not move backwards and thereby catch the plaintiff between the deadwood on the tender and the buffer on the front car

and injure him, while he was engaged in making said coupling and disconnecting the air brakes, then, the plaintiff cannot recover upon his claim of negligence of the engineer in causing or permitting said locomotive to run back upon the plaintiff while he was engaged in making the uncoupling.

12. If you find that the locomotive did run backward without any fault of the engineer but find that the engineer was exercising ordinary skill, care, prudence and watchfulness to
104 keep his locomotive at a standstill, while the plaintiff was making such uncoupling, then, the defendant would not be liable on the plaintiff's claim of negligence of the engineer in permitting or causing the locomotive to move back upon the plaintiff while he was making the uncoupling and disconnecting the air brakes.

13. If you find from the evidence in the case that the exercise of ordinary care, skill and prudence on the part of the engineer required him to maintain the air brakes while the plaintiff was making the uncoupling between the tender and front car and knew that the plaintiff was about to do so, and, instead of so maintaining the brakes, negligently released the air and thereby released the brakes while the plaintiff was engaged in making said uncoupling, by reason of which the plaintiff was caught between the deadwood on the tender and the buffer on the front car, and, injured, then, this would constitute negligence on the part of the defendant which would render the defendant liable for said injuries unless you find that the plaintiff was guilty of negligence which contributed to the injury.

13½. If it was safe for the brakeman of the train in question, in attempting to turn the angle-cock of the car in question, to reach under the couplers to do the work, and if it was perilous for him to reach over the couplers, and in doing so to go between the deadwood of the engine and buffers of the car in question, then the engineer would have a right to assume that plaintiff would do the work in a safe way and would not attempt to do the work in the perilous way without assuring himself that the slack of the train had already run out and that there was no further danger of the slack causing the cars of the train to move up against the engine.

14. If you find from the evidence in the case that when the plaintiff placed himself between the deadwood on the tender and the buffer on the front car that he was aware that the air had been released by the engineer from the brakes, and, the brakes
105 thereby released, and, that by reason thereof knew that he was liable to be caught by the action of the train in the rear of him in taking up its slack, or should have so known in the exercise of ordinary care, skill and prudence, and, you further find that he was caught and injured by the action of the cars in the rear of the front car in taking up the slack and pushing the front car upon him while he was between said buffer on front car and the tender, and, not by the locomotive moving back upon him, then, he assumed the risk of so doing when he placed his body between said deadwood and buffer, and was guilty of contributory negligence thereby and cannot recover on his claim of negligence of the engi-

neer in releasing the air and thereby releasing the brakes controlled thereby.

15. The plaintiff is held to know that which in the exercise of ordinary care, skill, prudence and watchfulness he would have discovered and ought to have known in the discharge of the duties which he was performing when he was injured.

16. You are instructed that it was the plaintiff's duty while engaged in making said uncoupling of the cars and air brakes to exercise ordinary care and prudence to avoid injury to himself while so doing, and if he failed to do so, and such failure contributed to the injury, then he cannot recover, even though the locomotive engineer was also guilty of negligence.

17. Ordinary care and prudence is such care and prudence as an ordinary, careful and prudent person would exercise under like circumstances, and a failure to exercise such care is negligence, and if the negligence of the plaintiff contributed to his injury then he cannot recover.

18. The care which the plaintiff is required to exercise while making the uncoupling should be commensurate with the danger to himself in performing the same, not that he is required to exercise more than ordinary care, but in determining what is ordinary care, skill and prudence, the known danger to himself to be avoided by him is an important element to be considered, and ordinary care,

skill and prudence is such care, skill and prudence as an
106 ordinary careful and skillful brakeman should exercise, in view of the known danger to be avoided.

19. If you find from the evidence in the case that the plaintiff in moving the angle-cock to disconnect the air brakes could have reached under the draw-bars and performed said duty with reasonable safety to himself, and further find that it was reasonably practicable to do so, then it was his duty so to perform said service, and, if under such circumstances he chose to reach over said draw-bars, and place himself between the deadwood on the tender and buffer on the front car, and you find that in the exercise of ordinary care, skill and prudence it was plainly hazardous and dangerous to do so, then, by so doing he would be guilty of contributory negligence and cannot recover.

20. If, however, you find from the evidence in the case that the plaintiff did in the first instance reach under the draw-bars, and found that he could not with reasonable practicability move said angle-cock by reason of the condition of the handle thereof, then he would not be guilty of contributory negligence by reason of reaching over said draw-bars; if you further find that the plaintiff in reaching over said draw-bars exercised ordinary care, prudence and skill in view of the increased danger and hazard which he would incur thereby, in order to protect himself from injury therefrom, and in so doing he would have the right to assume that the engineer would properly discharge his duties in the management of the locomotive.

20½. The rules of the company introduced and read in evidence are proper to be considered by you in connection with the other evi-

dence in the case in determining the questions of negligence and contributory negligence, insofar as they aid you in doing so.

21. If you find the plaintiff is entitled to recover, then you will inquire and determine from the evidence in the case the extent, nature and character of the injuries sustained by the plaintiff by reason of the defendant's negligence, if any, the mental and physical pain and suffering caused by said injuries, the expense of nursing him and caring for him incurred by the plaintiff, the loss of time and earnings caused thereby, and you will also inquire and determine from the evidence, that if any permanent disability has resulted to the plaintiff from said injury, and when you have determined these matters from the evidence in the case, then you will inquire and determine what amount of damages will be a just and fair compensation therefor which must not exceed the amount which the plaintiff claims, \$2,000.00.

22. The burden is upon the plaintiff to prove by the weight or preponderance of the evidence affirmatively the nature, character and extent of the injuries incurred by him, the loss of time and earnings caused thereby, the reasonable expense or cost of nursing, and any permanent disability resulting therefrom.

23. If you find the defendant liable then, without proof of any particular amount, you will inquire and determine what damages, if any, the plaintiff is entitled to recover therefor, which will be such sum as in your judgment will justify and fairly compensate the plaintiff for the mental and physical pain and suffering, if any, caused by the injury; the loss of time and earnings by the plaintiff, if any, caused by the injury as shown by the evidence; the reasonable expense of nursing him caused by the injury, and if you find that the defendant is permanently disabled and his ability to perform manual labor affected thereby, then such sum therefor as will in your judgment be a just and fair compensation therefor. The whole amount allowed for the same should not exceed the amount claimed by the plaintiff, \$2,000.00.

24. You are the judges of the credibility of the witnesses, and in determining the credit due any particular witness in the case, it is proper and your duty to take into consideration the appearance and demeanor of the witness while on the stand; the bias, prejudice, interest or feeling of the witness, as manifested while testifying, or shown by the evidence in the case. That the witness is corroborated or contradicted by other evidence in the case; that the witness is in the employ of the party calling him or against whom he is called; that the witness is related to the party calling him, friendly or unfriendly to him; that the witness has made statements out of court other and different from what he has testified in court; that the witness is a party to the suit and interested in the result. And such other matters as enables you to determine the credit due any particular witness and the weight to be given his evidence.

25. You are the judge of the facts in the case and these facts you must determine from the evidence in the case, examined in the light of reason and common experience, and not discard any evidence for

light and trifling reasons but give all the evidence in the case that weight to which you believe the same justly and fairly entitled.

25½. When the evidence of the witnesses is conflicting, it is your duty to reconcile their evidence consistently with the honesty of the witnesses when you can do so reasonably, but when you cannot, then you must determine from the evidence, circumstances and credibility of the witnesses to whom you will give credit.

ROBERT SLOAN, *Judge*.

To the giving of said instructions and each of them, except No. 13½, the defendant at the time excepted.

* * * * *

113 Be it also remembered that under the instructions given as aforesaid, the jury on the 19th day of October, 1903, retired, and afterwards, to-wit, on the same day, found and returned into court a verdict in favor of plaintiff for the sum of two thousand dollars and costs, as follows, to-wit:

The jury returned a general verdict in favor of the appellee in the sum of two thousand dollars and costs, which is as follows:

"CHARLES L. MCGUIRE

vs.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

"We, the jury, find for the plaintiff and assess his damages at two thousand dollars.

"W. S. HENDERSON, *Foreman*."

Be it also remembered that on the 20th day of October, 1906, judgment was rendered against the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company for the sum of two thousand dollars and costs of this suit.

On October 20, 1906, and within three days from the return of the verdict by the jury into court, and during the September term, 1906, of said court, the defendants, now appellants, filed in the cause, a motion for a new trial, and to set aside the general verdict of the jury.

* * * * *

114 1. That said verdict is not sustained by sufficient evidence.

2. That said verdict is contrary to the evidence.

3. That said verdict is contrary to the law.

4. The Court erred in giving each of the instructions given on its own motion, which instructions are numbered 1 to 25½.

* * * * *

115 13. The Court erred in sustaining the demurrer of plaintiff in the above entitled cause to the third count of the answer of the defendant, being count which sets up the fact of payment of benefits to plaintiff, \$492.00 direct and \$330.00 for medical services and expenses; total \$822.00, as an accord and satisfaction and release

by plaintiff of all damages sustained by him, being the same damages which plaintiff now claims in the above entitled cause.

14. The Court erred in sustaining the demurrer of plaintiff to the third count of answer of the defendant which count sets up as a bar and accord and satisfaction of plaintiff's claim for damages in this case the fact that he was a member of the Relief Department of defendant and that after his injuries complained of in this case he voluntarily received benefits paid by the Relief Department to the amount of \$822.00, which receipt of benefits pleads as a bar and release of plaintiff's claim for damages under the Relief Department contract set up in said count, being contract between defendant and plaintiff and between the Relief Department of defendant and plaintiff.

15. The Court erred in holding that Section 2071 of the Code of Iowa, as amended by the twenty-ninth general assembly of the State of Iowa, which amendment will be found in Chapter 49 of 116 the Acts of said twenty-ninth general assembly, commonly called "The Temple Amendment," was a valid and binding law and that it rendered nugatory and void the Relief Department contract pleaded in said third count and that hence said contract and the payment of benefits to plaintiff alleged in said third count, was not a release of the damages sued for by the plaintiff in this case and was not a bar to plaintiff's right to recover such damages. (For Section 2071, see Supplement Code of Iowa (1902) page 215.)

17. The Court erred in refusing to hold that the said act, Section 2071, Supplement Code of Iowa, Page 215, was void under the Constitution of the State of Iowa, especially under Section 9, Article 1, Page 64, Code of Iowa, which among other things declares that "no person shall be deprived of life, liberty, or property without due process of law."

18. The Court erred in refusing to hold and adjudge that said law—Section 2071—above referred to, was void and invalid under the Constitution of the United States, especially under the provisions of the Fourteenth Amendment of said Constitution of the United States and was insufficient to invalidate the Relief Department contract pleaded in said count three of defendant's answer.

19. The Court erred in refusing to hold that said act, Section 2071, as amended by the twenty-ninth general assembly of Iowa, which act is found in the Acts of the twenty-ninth general assembly, Chapter 49, and also in Supplement Code of Iowa, Page 215, did not invalidate the Relief Department contract pleaded in said third count of defendant's answer, and in holding that said Section 2071 rendered nugatory said Relief Department contract pleaded by defendant, notwithstanding the provision of the Constitution of the State of Iowa hereinbefore referred to, and notwithstanding the Fourteenth Amendment of the Constitution of the United States, and in holding that the payment by defendant's Relief Department to plaintiff \$822.00 of benefits was not a bar and release of his claim for damages sued on in this case.

On October 20, 1906, said motion was by the Court overruled

on each and every ground thereof, to which ruling of the Court and each one of them the defendants, now appellants, at the time duly excepted, and on the same day the Court rendered a judgment on said verdict and also entered judgment for costs against said defendants, to which judgment and ruling of the Court the defendants at the time duly excepted.

The defendants, now appellants, were at the time given thirty days by the Court in which to prepare and have signed and filed their Bill of Exceptions in this case, preparatory to an appeal.

On the 16th day of November, 1903, being within thirty days given by the Court, the Bill of Exceptions was signed by Hon. Robert Sloan, judge, and duly filed in this case, on same day, and duly incorporated therein all the pleadings, matters, evidence, rulings of the Court, exceptions of the parties taken and the proceedings of this case which is set forth in this abstract and making of the same a part of the record in this case.

On the 16th day of November, A. D. 1903, the appellant, the Chicago, Burlington & Quincy Railway Company, served a notice of appeal in this cause from the orders, findings and judgment of the District Court of Appanoose County, Iowa, rendered against it as defendant and appellant in the said cause, to the Supreme Court of Iowa, upon C. F. Howell and C. H. Elgin, attorneys of record for Charles L. McGuire, appellee, and on the same day it served said notice of appeal upon U. G. Turner, clerk of the District Court of Appanoose County, Iowa, and also filed in the cause a bond and undertaking to pay the costs of any transcript of the papers or records in this cause which may become necessary upon the trial of the cause on appeal, or which may be ordered by the Court on said appeal. The said bond was duly accepted and approved by the said clerk of the Court on said date.

The appellant, the Chicago, Burlington & Quincy Railway Company, executed a bond, signed by itself as principal, and D. C. Bradley, as surety, in the sum of \$5,000.000, which bond was filed in the office of the Clerk of the District Court, in and for Appanoose County, Iowa, and approved by G. C. Elliott, Clerk of said court, on

the 15th day of January, 1907, said bond conditioned that appellant would pay appellee all costs and damages that would be adjudged against it on the appeal, and satisfy and perform all judgments and orders appealed from in case they shall be affirmed.

On the 15th day of January, 1907, the appellant, the Chicago, Burlington & Quincy Railroad Company, served a notice of appeal in this cause from the orders, findings and judgment of the District Court of Appanoose County, Iowa, rendered against it as defendant and appellant in the said cause, to the Supreme Court of Iowa, upon C. F. Howell and C. H. Elgin, attorneys of record for Charles L. McGuire, appellee, and on the same day it served said notice of appeal upon G. C. Elliott, clerk of the District Court of Appanoose County, Iowa, and also filed in the cause a bond and undertaking to pay the costs of any transcript of the papers or records in this cause which may become necessary upon the trial of the cause on appeal, or which may be ordered by the Court on said appeal. The said bond was

duly accepted and approved by the said clerk of the court on said date.

The appellant, the Chicago, Burlington & Quincy Railroad Company, executed a bond, signed by itself, as principal, and D. C. Bradley as surety, in the sum of \$5,000.00, which bond was filed in the office of the Clerk of the District Court, in and for Appanoose County, Iowa, and approved by U. G. Turner, Clerk of said court, on the 17th day of November, 1906, said bond conditioned that appellant would pay appellee all costs and damages that would be adjudged against it on the appeal, and satisfy and perform all judgments and orders appealed from in case they shall be affirmed.

The foregoing abstract contains all of the pleadings, all of the motions, all of the evidence introduced, all of the offers of evidence, all objections to evidence, all of the rulings of the Court on admission of evidence, all rulings of the Court on motions, all rulings of the Court as to special questions asked, objections thereto and rulings thereon, rulings refusing instructions asked, rulings over-ruling objections to instructions given, all objections and exceptions of the parties to all of the rulings and actions of the Court in the
 119 cause, all rulings of the Court and all exceptions thereto, all instructions asked and refused and all of the proceedings in this case in said court, and all of which were duly made of record and preserved by bill of exceptions and filed in the cause at that time, to-wit, on the 16th day of November, 1906.

H. H. TRIMBLE,
 PALMER TRIMBLE, AND
 F. S. PAYNE,

Attorneys for Appellants.

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Record 24, page 353.

In the Supreme Court of Iowa.

No. 22987.

CHARLES L. MCGUIRE, Appellant.

vs.

C., B. & Q. Ry. Co. et al.

From Appanoose D. C.

OCTOBER 7TH, 1903.

Now on this day, Motion to advance filed herein, having been fully considered by the Court, it is ordered that said cause be advanced, and to be submitted at the Jan'y, 1904, Term.

Record 24, page 527.

No. 22987.

CHARLES L. MCGUIRE, Appellant,

vs.

C., B. & Q. Ry. Co. et al.

From Appanoose D. C.

JANUARY 12TH, 1904.

On this day this cause was continued by agreement of parties.

Record 25, page 97.

No. 22987.

CHAS. L. MCGUIRE, Appellant,

vs.

C., B. & Q. Ry. et al.

From Appanoose D. C.

MAY 4TH, 1904.

On this day this cause was submitted on the abstracts and arguments on file, and oral argument of counsel for appellee.

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Opinion of 1906.

Filed July 14th, 1906.

In the Supreme Court of Iowa.

CHARLES L. MCGUIRE, Appellant,

vs.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.

Appeal from Appanoose District Court.

Hon. M. A. Roberts, Judge.

The opinion states the case.

C. F. Howell, & C. H. Elgin, for Appellant.

H. H. Trimble, Palmer Trimble, F. S. Payne & J. W. Blythe, for Appellee.

WEAVER, J.:

The plaintiff's petition at law alleges that while in the service of the defendant Railway Company as brakeman and while in the exercise of reasonable care for his own safety he was seriously and per-

manently injured by reason of the negligence of a co-employee in the management of the train on which he was employed and he asks to recover damages in the sum of \$2000.

As a bar to the plaintiff's right of recovery the defendant alleges that at the time of the accident in which plaintiff was injured he was a member of the Burlington Relief Department, an association organized by the defendant and its employees (the rules and regulations of which are made a part of the answer) and that by reason of

122 such membership the plaintiff became entitled to recover certain benefits and that he did in fact receive from the association on that account the aggregate sum of \$822. It is further alleged that by the terms of the contract embodied in the Relief Department regulation plaintiff had an election to accept said benefits or to waive them and insist upon his claim against the defendant for damages but he was not entitled to both; and that by reason of his acceptance of such benefits he is now estopped to recover anything in this action. The answer further asserts that the provisions of Code section 2071 as amended by the Twenty-seventh General Assembly have no effect to bar or estop the defendant from relying upon the defense above stated, because said amendment is in contravention of the Constitution of the United States and the Constitution of the state of Iowa.

A demurrer to the answer having been overruled, the plaintiff appeals.

The questions suggested by the record and argued by counsel may be condensed as follows:

1. Assuming the truth of the matters pleaded in the petition and answer, is the case one calling for the application of the statutory provision upon which plaintiff relies?

2. If the foregoing question be answered in the affirmative, is Code Section 2071, as it now stands, a valid exercise of legislative power, or is it void as being in contravention of the constitution, national or state?

1. As originally enacted Code Section 2071 was in words as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including the employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs whether of commission or omission of such agents, engineers or other employees; when
123 such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed and no contract which restricts such liability shall be legal or binding." The amendment to which reference has been made adds to said section the following: "Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action

brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

The events leading up to the adoption of this amendment are matters of common knowledge. Subsequent to the enactment of Code section 2071 in its original form, a relief department scheme for the payment of benefits to injured employees was organized by the appellee herein—one of the provisions or regulations of the department being that the bringing of suit by a member for damages should suspend his right to receive further benefits until the suit was discontinued; and the acceptance of the benefits should operate as a release and satisfaction of all claims for damages. Prior to the adoption of the amendment it was held by this court that the relief contract was not void as being against public policy, and employees of the railway who accepted benefits from the association on account of injuries received in the company's service, were held to be barred from the recovery of damages.

124 Donald vs. R. R. Co. 93 Iowa 284.

Maine vs. R. R. Co. 109 Iowa 260.

Upon the announcement of the first of the cited decisions the matter of further legislation to restrict or prohibit contracts of this nature became a topic of very general discussion throughout the state, and in apparent response to the public sentiment manifested the 28th General Assembly enacted the amendment quoted above. That it was intended to invalidate defenses like that which is here pleaded and to permit an employee injured by the neglect of the corporation or its servants to recover his damages notwithstanding the terms of his membership in the Relief Department or the receipt of benefits thereunder, seems to be very clear from the language employed. To the extent that the legislative will is here expressed, the question of public policy which has been argued by counsel, is eliminated; for the statute, if constitutional, must stand as the authoritative expression of the public policy of the state which the courts are bound to observe and enforce. But it is said in behalf of appellee that the amendment even if valid has reference to such relief contracts only as operate to "restrict the liability" of the company and that this court by its decisions under the statute, as it stood before the amendment, has already held contracts similar to the one now before us not to be of that character. This argument is reinforced by the further proposition that if the amendment is to be construed as enlarging the scope of the section and applied to cases not before within its prohibition, it must be held unconstitutional because the title "An act to amend Code section 2071" does not sufficiently set forth the subject of the legislation. It will be conceded that to be of any effect an amendment to a statute must

125 have some relevancy to the original act and the two are to be read together in seeking to discover the legislative will and purpose. But there is no rule of interpretation requiring us to give the amended statute a meaning which differs in any degree from that which would have been given it, had the matter of amendment been made a part of the original act. In other words, unless

the contrary intent is clearly indicated, the amended statute is to be construed as if the original statute had been repealed and a new and independent act in the amended form had been adopted.

Holbrook vs. Nichols, 36 Ill. 161.

McKibben vs. Lester, 9 O. St. 627.

Farrell vs. State, 54 N. J. L. 421.

Kenefick vs. Castleman, 26 Mo. Appl. 587.

Humphrey vs. Parsons, 15 N. Y. 595.

Conrad vs. Nall, 24 Mich. 277.

Now Code section 2071, as first enacted, making railway companies liable for injuries occasioned to a servant by the negligence of a fellow servant, gave to employees in that service an important right or measure of protection which did not before exist, and undertook to guard the same by a provision rendering void any agreement or stipulation in the contract of employment waiving or restricting the benefit of such statutes. This provision was stated in general terms only and when it was invoked to avoid the effect of appellee's relief department contract, this court decided, as we have already seen, that such contract did not restrict the statutory liability of the corporation and was *was* therefore not affected by the prohibition. Thereafter, and by the amendment referred to, the legislature added a clause enumerating certain specific acts, agreements, contracts and stipulations which shall constitute no defense to an action brought for the enforcement of the statutory liability. That enumeration so accurately described the contract upon which the appellee here relies that it would be a mere affectation to profess to misunderstand

it. To place upon it the construction asked for by the ap-
126 pellee is to deprive the amendment of all force and effect.

The section in its original form invalidated in general terms all contracts restricting the liability of the corporation; and if, as contended, the amendment must be construed as applying to such agreements for insurance, indemnity or benefits, as tend to "restrict" that liability within the meaning of the court's opinion in the Donald case, then it neither increases or diminishes the scope of the original provision and the passage of the amending act was an idle and useless ceremony. Its words are not in the least obscure, its purpose is obvious, and unless we arbitrarily disregard the plain terms of the statute it must be construed in substantial accord with the appellant's contention.

This being determined, we have next to inquire concerning its validity.

II. There is in our judgment no fatal defect in the title of the amending act. That act has but one purpose—the amendment of Code section 2071 and that purpose is succinctly stated. It is a general rule that a title which simply names or describes an amending act as such without stating the specific character or substance of the amendment, is sufficient.

Morford vs. Unger, 8 Iowa, 82.

Iowa S. & L. vs. Selby, 111 Iowa, 402.

Turner vs. Harrison, 109 Ill. 592.

People vs. Whitlock, 92 N. Y. 191.

Robinson vs. Lane, 19 Ga. 337.

The act as amended relates to but one subject. The object sought to be obtained by the original statute was the imposing of a liability upon railway corporations in favor of their employees and the protection of the latter in the right thus created. If in view of the practical operation of the statute the legislature wisely or unwisely, concluded that the protection thus provided was not sufficient for the intended purpose and desired to specifically provide that the right given to the employee should not be waived or lost by reason of his membership in a railway Relief Department or by participation in its benefits, it seems plain, that, (assuming the validity of such legislation in any form,) it was entirely competent to so enact by way of amendment to the original statute and that such amendment does not introduce a new subject of legislation.

Generally speaking, the purpose of every amendment is to enlarge or restrict the application or effect of the statute so sought to be amended, and the fact that in the case at bar the amended statute is made to include within its prohibition a class of contracts which escaped the ban of the original act, does not introduce a new or independent subject of legislation.

It is only the general purpose which is to be expressed in the title and not the methods or provisions by which that purpose is to be accomplished.

People vs. Hurlburt, 24 Mich. 44.

People vs. Briggs, 50 N. Y. 553.

Murdock vs. Woodson, 2 Dill. 188.

It is sufficient if the provisions of the statute expressed have congruity and proper connection.

De Witt vs. San Francisco, 2 Cal. 289.

Commonwealth vs. Green, 58 Pa. 226.

State vs. Mines, 38 W. Va. 74.

Robinson vs. State, 15 Tex. 311.

Reed vs. State, 12 Ind. 641.

The title to an act "Need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject which it embraces. Nor is the act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title." *Pittsburg Ry. Co. vs. Montgomery*, 152 Ind. 1.

The title to the original act and of the amendment comes fairly within the rule of these authorities and the objection thereto is not well taken.

III. Summing up their argument against the validity of the statute, counsel narrow the question to the proposition that it violates the Fourteenth Amendment to the Constitution of the United States, as well as the somewhat similar provisions found in our state constitution. They say

128 There are but two provisions of the Constitution of the United States relied upon by appellee in this case. These are found in the Fourteenth Amendment. The substance of these pro-

visions are, that no State shall pass any law that will *deprive any person of the right of life, liberty and property*, or deprive any person of the *equal protection* of the law. There are two provisions in our State Constitution, substantially similar: Section 1, Article 1, Code page 60, and Section 6, Article 1, page 61. We assume that the Court will regard itself bound to determine whether the Temple amendment is repugnant to these two provisions of the State Constitution.

The questions thus raised are of great importance and have been thoroughly and exhaustively presented in the briefs of counsel. It is well at the threshold of the discussion to recall the familiar rule by which we are bound in passing upon any proposition affecting the constitutionality of a legislative enactment.

While it is an imperative duty from which no court will shrink to declare void any statute the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and judicial departments of our government requires that this prerogative be exercised with the greatest caution and only after every reasonable presumption has been indulged in favor of the validity of the act.

Merchants Union vs. Brown, 64 Iowa 275.

Stewart vs. Supervisors, 30 Iowa 91.

Duncombe vs. Prindle, 12 Iowa, 1.

Reed vs. Wright, 2 G. Gr. 15.

State vs. Judge, 2 Iowa, 280.

Whiting vs. Mt. Pleasant, 11 Iowa 462.

Flint Co. vs. Woodhull, 25 Minn. 99.

Evans vs. Job, 8 Nev. 322.

It is not the province of the court to pass upon the policy, wisdom or justice of the statute or upon the expediency of its enactment.

R. R. Co. vs. Supervisors, 67 Iowa 199.

Merchants Union vs. Brown, *Supra*.

So thoroughly are the courts committed to this theory of the law that in *Stewart vs. Supervisors*, *supra*, it is said that a legislative act may be declared unconstitutional only when it violates that instrument *clearly, palpably, plainly*, and in such manner as to leave no reasonable doubt." In this same case we approvingly quoted

129 the language of Mr. Justice Baldwin of the federal court as follows: "We cannot declare a legislative act void because it

conflicts with our opinions of policy, expediency or justice. We are not the guardians of the rights of the people of the state unless they are secured by some constitutional provisions which comes within our judicial cognizance. The remedy for unwise or oppressive legislation within constitutional bounds is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but the courts cannot assume their rights."

The inquiry to which we are confined is one of legislative power alone. It is fundamental in our system of government that all

powers not delegated to the United States by the terms of the Federal Constitution and its amendments, nor prohibited by it to the states are reserved to the states or to the people.

Tenth Amendment to the Constitution of the U. S.

Subject to the authority thus expressly or by necessary inference delegated to the federal government, the state has sovereign legislative power over all subjects except such as are withheld from it by the constitution of the state itself.

- Body vs. Ellis, 11 Iowa 97.
- Stewart vs. Supervisors, 30 Iowa 9.
- Purcell vs. Smith, 21 Iowa 540.
- Morrison vs. Springer, 15 Iowa, 324.
- Boyer vs. Kinneck, 90 Iowa 74.
- Hawkeye vs. French, 109 Iowa 588.
- New York vs. Miln, 36 U. S. 102.
- R. R. Co. vs. Dey, 82 Iowa 312.
- In re Meador, Fed. Cases No. 9375.
- Wadley vs. Develling, 1 Ill. App. 596.
- Moor vs. Veazie, 32 Me. 342.
- Beyman vs. Black, 47 Tex. 558.

It is not for the court to inquire or determine whether a state of facts existed calling for the enactment of the legislation in question. That is for the exclusive consideration of the legislature. If under any possible state of facts the act would be constitutional and valid, the court is bound to presume that such condition existed.

Munn vs. Illinois, 94 U. S. 113.

State vs. Pekham, 3 R. I. 289.

130 In re ten hour law, 54 At. R. 602.

IV. Is the statute objectionable as class legislation or as denying to the corporation the equal protection of the laws? The Fourteenth Amendment to the Constitution of the United States provides among other things that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

While a corporation is not a citizen within the meaning of this amendment, it is a "person" and as such may not rightfully be denied the protection of the laws of the state upon equal terms with all other persons under like circumstances and conditions.

Smyth vs. Ames, 169 U. S. 461.

Blake vs. McClurg, 172 U. S. 259.

Pembina vs. Pennsylvania, 125 U. S. 188.

N. Y. and N. E. R. R. Co. vs. Bristol, 151 U. S. 556.

But the reasonable classification of persons for the purposes of legislation according to occupation, business or other circumstances by which one class or portion of the people is differentiated from other portions or classes, has often been held not to be a violation of this constitutional guaranty. The mere fact that legislation is special and made to apply to certain persons and not to others does not affect its

validity if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions.

Hayes vs. Missouri, 120 U. S. 68.

Commonwealth vs. R. R. Co. (Mass.) 73 N. E. Rep. 530.

State vs. Nelson, 52 O. St. 88.

People vs. Smith, 108 Mich. 527.

People vs. Walbridge, 6 Cowen, 512.

Dugger vs. Ins. Co., 95 Tenn. 245.

Walston vs. Nevin, 128 U. S. 578.

Duncan vs. Missouri, 152 U. S. 377.

Broadfoot vs. Fayetteville, 121 N. C. 422.

State vs. Turner, 84 S. W. 10.

People vs. Bellett, 99 Mich. 151.

Such also has been the uniform holding of this court with reference to the corresponding provision in our state constitution. A leading case to this effect is

McAunich vs. R. R., 20 Iowa 338.

131 As we there said "such laws are general and uniform, not because they operate upon every person in the state, but because every person who is brought within the relations and circumstances provided for, is affected by the law. They are general and uniform in their operation upon all persons in the like situation and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." Treating the same question the Supreme Court of the United States by Field, J. in Mackey vs. R. R. 127 U. S. 205 says "The greater part of all legislations is special either in the objects sought to be attained by it, or in the extent of its application. * * * Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws because it is special in character. And when legislation applies to particular bodies or associations imposing upon them additional liabilities it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same condition."

See also

People vs. Havnor, 149 N. Y. 205.

Missouri vs. Lewis, 101 U. S. 22.

Duncan vs. Missouri, 152 U. S. 377.

Watson vs. Nevin, 128 U. S. 578.

Grozza vs. Tiernan, 148 U. S. 657.

R. R. Co. vs. Backus, 154 U. S. 421.

R. R. Co. vs. Crider, 91 Tenn. 501.

Butte vs. Palrontah, 30 Mont. 18.

That legislation imposing upon railway companies special restrictions, obligations and liabilities not generally applicable to other persons or corporations is not a denial of the equal protection of the laws has been so often decided as to be no longer a debatable question.

Thus the courts have upheld statutes depriving railway companies of the benefit of the fellow servant doctrine.

Herrick vs. R. R., 31 Minn. 11.

R. R. vs. Mackey, 127 U. S. 205.

R. R. vs. Herrick, 127 U. S. 210;

132 requiring railway company to pay attorney's fees to the land owner in condemnation proceedings.

Gano vs. R. R., 114 Iowa 719.

Same case, 190 U. S. 1183.

subjecting railway corporations to double damages under certain circumstances,

R. R. Co. vs. Humes, 115 U. S. 512.

R. R. vs. Beckwith, 129 U. S. 26;

denying railway corporations the right of appeal from assessment for taxation, although such right is given to owners of other taxable property;

R. R. vs. Backus, 154 U. S. 421;

making such corporations liable without regard to negligence for fires set by their engines;

R. R. vs. Matthews, 174 U. S. 96;

and requiring them to pay without discount to a discharged employee wages earned at the time of discharge.

R. R. vs. Paul, 173 U. S. 404;

In each of these cases and in many others which might be cited, the statute under consideration was made applicable to railway companies only, and in each case it was vigorously assailed as a denial of the equal protection of the laws, but in each instance after thorough argument proceeding along the lines followed by counsel for the appellee herein, the court of last resort has uniformly held the legislation to be a valid exercise of the police power of the states. In view of these decisions we think it beyond question that the statute here under consideration cannot be said to be void as a denial of the equal protection guaranteed by the Fourteenth Amendment.

As to the general nature of this amendment and the limits of its application see

Davidson vs. New Orleans, 96 U. S. 97.

R. R. Co. vs. Haines, 115 U. S. 512.

Barber vs. Connolly, 113 U. S. 27.

R. R. Co. vs. May, 194 U. S. 267.

Ins. Co. vs. Dobney, 189 U. S. 401.

Froehlich vs. R. R. Co., 24 Ohio Cir. 259.

R. R. Co. vs. Mahaffy, 81 S. W. 104.

133 V. Is the statute an unwarranted interference with liberty of contract?

The right of contract is not one of the rights which are guaranteed

in express words by the constitution, but such protection exists as a necessary inference from the express guaranty of property rights. This right, like all other possessed by the individual member of society, is held subject to such reasonable restrictions and regulations as may be imposed for the general good. The power by which these limitations are imposed upon the liberty of the individual is commonly called the police power which is but another name for that portion of the sovereignty of the state not surrendered by the terms of the national compact. The police power as that term is commonly employed may be paraphrased as society's natural right of self defense and its definition and limitation vary with the circumstance calling for its exercise. To enshrine it in any fixed or rigid formula would be to destroy its value for it would then be deprived of its indispensable quality of adaption to changing conditions and thus defeat the ends it was intended to promote.

Words & Phrases Vol. 6 page 5424, and cases there cited.

While protection of public health and public morals and the promotion of social order are peculiarly within its province these are but instances of its application and do not limit its sphere of action.

People vs. Budd, 117 N. Y. 1.

Barber vs. Connolly, 113 U. S. 27.

The police power of the state is the power to govern men and things within the limit of its dominions. It comprehends all those general laws of internal regulations necessary to secure peace, good order, health and prosperity of the people and the regulations and protection of property and property rights.

State vs. Harrington, 68 Vt. 622.

State vs. Reynolds, 58 At. Rep. 755.

134 It adapts itself to the changing conditions of society and makes it competent for the state to devise, adopt and enforce any new regulation or restriction not clearly forbidden by the constitution which it believes to be expedient under the peculiar circumstances with which it is sought to deal. The spirit which pervades the police power is closely related to that which is embodied in the common law maxim "*Sic utere tuo alienum non laedas.*" The liberty of the individual may always be restrained where its unregulated exercise becomes a source of danger or injury to the society of which that individual is a member. "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill on Liberty Chap. 4.

See also

Powell vs. Commonwealth, (Pa.) 7 Rep. 913.

Oil City vs. Trust Co. 25 At. Rep. 124.

Connolly vs. Christianson, 167 U. S. 289.

Jameson vs. Oil Co. 128 Ind. 566.

Garrett vs. Mayor, 47 La. Am. 630.

Stone vs. Mississippi 101 U. S. 814.

State vs. Tower, (Mo.) 84 S. W. 10.

Of course it must be kept in mind that the police power like all other powers of the state is subordinate to the constitution and if the legislature under the guise of police regulation transgress the express or clearly implied limits drawn by the constitution, the courts will hold the act void and of no effect, but this authority of the court involves a duty of the most delicate and responsible character, and as we have already said, is to be exercised in no doubtful case. The court is not to substitute its own ideas for those of the legislature as to the propriety, wisdom or justice of the statute. It must not arrogate to itself superior knowledge of the public needs nor assume to prescribe remedies for public ills. Cases may perhaps be found where this fundamental distinction has apparently been overlooked, thus affording some measure of support for the proposition advanced by counsel that "the validity of the statute
135 depends upon the question whether it is a measure for the public good." The adoption of such a rule would be to transfer the law making power to the judiciary and work the utter elimination of the legislative department as a co-ordinate branch of the government.

The courts do not sit to revise or review legislative action and if they hold an act invalid it is because the legislature has failed to keep within the express or clearly implied limitations of the constitution. A court has no right to declare an act invalid solely because of unjust and oppressive provisions or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed by the constitution. Except when the constitution has imposed limits upon the legislative power it must be considered practically absolute. Neither are the courts at liberty to declare an act void merely because in their judgment it is opposed to the spirit of the constitution. They must be able to point out the specific provision, expressed or clearly implied from what is expressed, which the act violates.

Cooley's Const. Lim. Chap. 7.

Winver vs. Jones, 10 Ga. 190.

The duty to keep within the constitutional limits of its jurisdiction is no less binding upon the court than upon the legislature.

It is a settled proposition that the Fourteenth Amendment to the federal constitution was not intended to limit or hamper the states in the exercise of their police powers.

Mugler vs. Kansas, 123 U. S. 623.

Re Mennsler, 136 U. S. 625.

Ex parte Converse, U. S. 624.

Powell vs. Pennsylvania, 127 U. S. 678.

Considering a statute like our Code section 2071 the Minnesota court declares it to be "a police regulation intended to protect life, person and property by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies."

136 Mickelson vs. Truesdale, 65 N. W. 260. Nor is this protection confined to the employees alone. It tends as well to increase the safety of the millions of people and the vast

aggregate of property daily transported by these companies and the public interest is directly subserved and promoted by every reasonable rule or device by which negligence in such business is lessened or prevented. The Ohio court dismissing a similar statute of that state has said that the liability is not created for the benefit of the employes alone but has its reason and foundation in public necessity and policy. *R. R. Co. vs. Spangler* 44 Ohio St. 470. See also *Kane vs. R. R. Co.* 67 C. C. A. 653.

V. Assuming then that the statute is not to be avoided as class legislation or as depriving railway corporations of the equal protection of the laws, let us inquire whether it is of such manifestly arbitrary and unreasonable character that it cannot be justified by reference to the police power? For several reasons we are constrained to answer this inquiry in the negative.

(1) It should be kept in view at all stages of this discussion that the enactment, the validity of which is denied by the appellee is an attempt by the legislature to protect a right which Code Section 2071 in its original form conferred upon railway employees; and we think it a rule the soundness of which cannot be successfully denied that where the legislature, acting within its constitutional power, provides a right or confers a benefit which did not before exist, it may in its discretion also provide that no contract by which that right or benefit may be waived, lost or impaired shall be of any validity whatever.

For instance having given homestead rights to heads of families and exemptions to debtors in execution, no one at this day will question the power of the legislature to provide that any contract which in its judgment may serve to defeat or lessen the value of the right so created shall be void. The authorities upon this and kindred propositions are too numerous and familiar to require
137 citation. Congress having provided pensions and bounties for the benefit of persons performing military service may make invalid any contract by which the soldier agrees to pay more than a certain fixed sum to his attorney for assistance rendered in establishing his right to the benefit thus created; and may even make it a crime for the attorney to demand, or receive more than the Statutory fee even though he demands or received no more than he has reasonably earned.

Frisbie vs. United States, 157 U. S. 160.

As we have already quoted, the validity of the statute abolishing the fellow servant rule in the interest of railway employees has been fully established in both state and federal courts; and in our judgment the amendment of 1898 was a legitimate exercise of the inherent power of the legislature to protect the right which it had created.

That the act is reasonably adapted to effect its ostensible purpose to prevent an improvident waiver or surrender by the employer of the right conferred upon him by the law, can hardly be questioned. Without some limitation upon the right of contract a law imposing liability upon the employer in favor of the employee would be of no practical benefit to the latter, for in the absence of any restriction

the natural and certain recourse of the employer would be to make the waiver of such benefit a condition of every contract of employment. Possibly, even without a statute, such waiver would be held void on grounds of public policy, but that fact does not negative the propriety or validity of protective legislation.

It was in view of this situation that our law makers sought, both in the original act and in the amendment, to fence against the frustration of its purpose to confer a substantial benefit upon a large class of citizens engaged in a hazardous quasi public employment. That the appellee's relief department was devised to require or induce its employees to pool their contributions
138 and through the medium of an insurance or benefit fund made up chiefly by deductions from their wages, pay their own losses and thus, in some degree, relieve the corporation from the liability imposed by the statute, is not seriously disputed.

Under the original statute this contract did not constitute a restriction upon the liability of the corporation because as held by us in the case of Donald and Maine the employee who became a member of the relief department retained the option to pursue his action for damages or accept the alternative relief afforded by the department. But the legislature might not unreasonably believe and evidently did believe that such contract, even if as a technical legal proposition it did not restrict the corporate liability, operated to lessen the value of the benefit conferred by the statute. Entertaining such view, the enactment of the amendment of 1898 was a natural and appropriate measure to prevent the indirect defeat of the benevolent purpose of the original statute. Our decisions upon the statute as at first enacted could have no effect to prevent further legislation upon the subject.

So too it may well be said that if the legislature believed that by reason of the relations between employer and employee, or by reason of the peculiar circumstances liable to surround the latter when called upon to exercise his option, the practical operation of the relief plan might be to relieve the company from its statutory liability without a corresponding adequate benefit to the employee, then an amendment specifically including the relief contract within the prohibition of the statute would not be an unreasonable stretch of legislative power. Nor is this legislative view of the necessity or propriety of the amendment wholly without foundation. The average railway employee is not a man of wealth. More often than otherwise his total possessions, if any, are represented by a modest home and he depends upon his wages to meet his current living expenses.
139 If he has a family, they too are dependent upon his earnings.

If severely injured the pain from his wounds, the anxiety for his dependent family, the pressure of his immediate needs are not conducive to calm and business like reflection upon what may prove to be a matter of great importance to him and to those who look to him for support. The immediate aid which the relief department offers may under such circumstances assume an exaggerated importance in his eyes, and in his weakness and distress lead him to accept a benefit inferior to that which he might other-

wise be entitled to recover. Moreover the legislature may well have believed that while membership in the relief department was entirely voluntary in the legal sense of the word it was still possible for the employer by making the tenure of service more secure to those who became members to bring to bear an influence in that direction savoring of moral coercion.

That the possibility of this pressure upon the laborer is not entirely the creature of imagination finds support in appellee's argument where all employees who refuse to enter the relief department are classified as belonging to the "thoughtless and improvident class" of persons whom railway companies try to avoid and are the "first to go" whenever the service is to be cut down.

Conceding that it is beyond the power of the state to take from the employer the right to discharge his employee, or from the employee the equal right to leave the service of his employer with or without cause, subject of course to any legitimate claim for damages for violation of contract, it is none the less true that the state may still properly provide that no contract into which the employer invites his employee under the express or implied threat that his refusal will mark him as the first to be discharged from employment, shall be of any avail as a defense to an action for the enforcement of a statutory liability created for his benefit.

140 (2) The relations between employer and employee are and always have been recognized as proper subjects of police regulation, but recent years with the extraordinary changes wrought in industrial affairs have given that phase of our law peculiar prominence. New social and economic conditions have demanded and received the attention of law makers and courts. Employer and employee do not stand in the same relative position which they occupied before the various lines of industry became concentrated in comparatively few hands and before workers were marshalled into such vast armies that employers must of necessity deal with them in masses rather than as individuals. These changes have not been accomplished without serious friction between wage payers and wage earners. Where the blame or responsibility rests is not for us to consider. The condition has existed and still exists and neither legislature nor courts can with propriety ignore it. In every industry employing any considerable amount of labor the employees are organized for associated effort, seeking to maintain or increase labor's share of the wealth it assists in producing. Employers are likewise organized to check or offset the power and influence of associated labor. Strikes and lockouts are by no means uncommon and no year goes by when some one or more of these contests does not assume formidable proportions disturbing the peace and good order of society, and inflicting injury of a most serious nature upon all lines of business. The tying up for a single day of a single railroad system is attended by grave inconvenience and loss to the public while anything like a general suspension of traffic is productive of immediate and wide spread calamity. So close and vital is the dependance of the public welfare upon harmony between labor and

capital that the legislature may well exercise a liberal discretion in the enactment of measures to suppress and guard against every influence which tends to promote discontent or discord between them.

141 This truth has already challenged general attention and has found expression in the statutes and court decisions of every state of our union. Among the legislative measures recognizing the propriety if not the necessity of laws for the protection and promotion of the interest of labor, we may mention those providing for the establishment of bureaus of labor; for preference to claims for labor in the settlement of insolvent estates; for laborer's liens; for employer's liability for personal injuries to employees; for the screening and weighing of coal as a basis of miner's wages; for compulsory payment of wages at frequent or regular intervals; limiting the hours of labor; allowing attorney's fees in actions for the recovery of wages; forbidding the payment of wages in store orders or other paper not redeemable in money and invalidating the assignment of wages before they are earned. These are but samples of the many which might be enumerated of laws already in existence in many of the states and the volume and variety of such legislation is rapidly increasing. Some of these experiments may be crude and of doubtful expediency and others may be marred by fatal defects; but the general movement of which they mark the progress is proof of the urgency of the demand for an adjustment of the law to meet new and unprecedented conditions. It is true that some of these measures have been invalidated in certain jurisdictions as unconstitutional while in others they are sustained. Indeed it is not strange that in dealing with untried conditions legislatures should have occasionally exceeded their constitutional power, nor is it strange if courts in the conservatism should sometimes have failed to give due consideration to the thought that radical changes in circumstances affecting the public welfare may justify the application of remedies which under former conditions would have been rightfully held arbitrary and unreasonable. We cannot undertake to collate the conflicting precedents or determine the mere numerical preponderance of the authorities.

After a thorough examination of the cases we are satisfied that the present current of authority tends to uphold all reasonable provisions for the protection of labor and that Code Section 2071 is fairly within the scope of the powers of the state. We are not impressed with the suggestion, made by some courts which condemn such legislation, that it is an offensive imputation upon the manhood and independence of the laborer to thus assume that he needs the special guardianship and protection of the law. This easy method of argument would wipe out most of our statutes. Generally speaking all law is made to protect man against undue advantage at the hands of other men and the chief justification for legislation upon matters of personal and property right is the fact that men do not and cannot always deal on equal footing. Under no circumstances is this inequality more frequent than in the relations between employer and employee under modern conditions. Indeed in this inequality of advantage is found the only justification

for any of the many labor laws to which we have referred. This condition, as affording sufficient basis for the exercise of police regulation, has often been recognized by the courts. In *Holden vs. Hardy*, supra the Supreme Court of the United States in sustaining a statute regulating the hours of labor in mines and making it a penal offense to disregard its terms, says, The legislature has recognized the fact which the experience of legislators in many states has corroborated that the proprietors of these establishments and their operatives do not stand upon an equality and that their interest are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employees while the latter are often induced by the fear of discharge to conform to regulations which their judgment fairly exercised would pronounce to be detrimental to their health or strength.

In other words the proprietors lay down the rules and the laborers are practically constrained to obey them, in such cases self interest is often an unsafe guide and the legislature may properly interpose its authority * * * But the fact that both parties are of full age and competent to contract does not necessarily deprive
143 the state of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare however reckless he may be. The whole is no greater than the sum of all its parts and when the individual health, safety and welfare are sacrificed or neglected the state must suffer."

Sustaining the validity of an act requiring certain corporations to pay all their laborers in money and at specified short intervals the Supreme Court of Rhode Island uses this language. "If it be said that however rich and powerful corporations may be and however poor and weak their employees, the latter are not obliged to work for the former and if they choose to work for the corporations they can, but for Chapter 918, make such agreements as they see fit and thus protect themselves, then it can be replied that poverty and weakness can wage by an unequal contest with corporate wealth and power and that the legislature in granting valuable powers and privileges might be willing to do it or if already granted to continue them, it *is* has retained the power to amend such original grant, only on condition of minimizing the corporate power to drive hard bargains with their employees who too often in the sharp and bitter competition for work have to submit to such terms and conditions as their employers see fit to prescribe."

State vs. Brown, 18 R. I. 16.

The state of Tennessee has a statute by which employers of labor who issue store orders or script in payment for labor are required to redeem the same in money if demanded, any agreement or contract to the contrary notwithstanding. This provision was upheld by the supreme court of that state in an able and exhaustive opinion as within the proper limits of the police power.

Among other reasons stated in support of this view the court says:—"The legislature evidently deemed the laborer at some disad-

144 vantage under the existing laws and customs and by this act undertook to ameliorate his condition in some measure by enabling him at his election and at a proper time to demand and receive his unpaid wages, in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee on equal ground in the matter of wages and so far as calculated to accomplish that end it deserves commendation."

Harbison vs. Iron Co. 53 S. W. 955.

On appeal to the Supreme Court of the United States this judgment was affirmed. The opinion written by Shiras J. expressly quotes from and readopts the opinion of the Tennessee court as being "so full and satisfactory" as to make it unnecessary to again go over the ground.

Iron Co. vs. Harbison 183 U. S. 13.

Following the same line of thought the Supreme Court of Vermont upholds a statute which in effect forbids a railway employee to contract for the assumption of risk of a hazardous appliance or unsafe place to work, saying, "If it be objected that the statute when thus read deprives the laborer of his right to make his own contracts the answer is to be found in the principle that the state has the right to protect its poor and helpless even to that extent if need be. Such is the basis of the decisions that uphold the Utah labor law restricting the hours of mining work to eight hours per day; statutes that forbid the employment of children in certain callings; the store order acts; and the statutes against usury. In defense of the last named of which this court held some twenty years ago that even a release under seal given by the borrower at the time of the loan did not bar his right to recover the unlawful rate, declaring that the statute was intended for the protection of the weak against the strong, and public policy requires that it should not be evaded nor its force abated. Everybody knows that there are large classes who get their living from day to day in such service as that in which plaintiff was engaged, who must work where they are working and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such

145 "If you do not like the conditions you may quit" is often only a heartless mockery

Kilpatrick vs. R. R. 74 Vt. 288.

Mr. Freund addressing himself to the objection that such statutory restrictions deprive the laborer himself of liberty of contract, says the "argument is fallacious in the case of wage contract where the voluntary assumption by one may through stress of competition force others to assume the same burden against their will."

Freund on Police Power Sec. 500-503.

See also

Keating J. in Archer vs. James, 2 Best, and S. 73;
and Byles J. in same case page 82.

In the very recent case of *Lochner vs. New York* decided by the Supreme Court of the United States reported 198 U. S. 45, a statute prohibiting owners and proprietors of bakeries from requiring or permitting employees to labor more than ten hours per day and making a violation of this provision punishable as a public offense, was by a majority decision held to be an unconstitutional interference with liberty of contract. The case is not parallel in fact or principle with the one at bar, but it is worthy of note that four of the nine members of that court unite in a vigorous dissent holding that even such drastic legislation is clearly within the police power of the state.

In recognizing the soundness of the views expressed by the cited authorities we do not say nor is it necessary to believe that the employer is actuated by a wanton or oppressive spirit. It is enough to say that he is human and as such is therefore only humanly and naturally inclined to exact a profitable bargain if the opportunity offers, just as the laborer himself is ready to take advantage of favoring circumstances to exact the highest wage. But the opportunities are not equal. The employer, as a rule, has some store of capital to stand between him and immediate want if business grows slack or suspends, while the average laborer has little or no reserve for the proverbial "rainy day" and sooner or later
146 must accept the terms which are offered him.

It is with this condition in view that the legislature has enacted the statute under consideration for the purpose of preserving as near as possible that equality of advantage to both parties which is essential to the general good, and, as is well said in the *Harbison* case *supra*, "This alone commends the act as a valid police regulation." To same effect see *Hancock vs. Yaden*, 121 Ind. 366.

(3) The right of the state to regulate liberty of contract is peculiarly applicable to corporations. That corporations are entitled to the equal protection of the laws has already been shown but this does not mean that corporations and natural persons stand in the same relation to the power which inheres in the state to regulate their conduct or methods of business. The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights for which he is not indebted to organized society. He is born to them. The constitution and laws recognize them and provide safeguards for them, but do not create them. The corporate person has no rights except those with which it is endowed by the law making power, and the power of creation necessarily implies the power of regulation.

See

- R. R. vs. Bristol, 151 U. S. 556.
- R. R. vs. Paul, 173 U. S. 404.
- R. R. vs. Mathews, 174 U. S. 96.
- Hooper vs. California 155 U. S. 648.
- Ins. Co. vs. Daggs, 172 U. S. 557.
- Dayton vs. Iron Co. 183 U. S. 23.
- Ins. Co. vs. Needles, 113 U. S. 574.
- Sinking Fund Cases, 99 U. S. 648.

Herrick vs. R. R. 31 Minn. 11.
 State vs. Brown, 18 R. I. 16.
 R. R. Co. vs. Lyon, 123 Pa. St. 140.
 Peel S. C. Co. vs. W. Virginia, 36 W. Va. 802.
 Paul vs. R. R. 64 Ark. 83.
 Tullis vs. R. R. 175 U. S. 353.
 Skinner vs. Garnett, 96 Fed. 745.
 U. P. R. R. vs. M. C. R. R. 123 Fed. 238.
 Commonwealth vs. R. R. 129 Pa. St. 324.
 Iron Co. vs. Harbison, 183 U. S. 13.
 S. C. Street R. R. vs. Sioux City, 78 Iowa 746.

It is true that in some of the foregoing cases special prominence is given to an express reservation of power in the state to amend or repeal corporate charters, a rule the applicability of which to the present controversy we need not consider, but the Supreme Court of the United States which upheld that contention in R. R. vs. Paul, *supra*, advances another step in the later case of Iron Co. vs. Harbison *supra*, and announces the rule that irrespective of the right of charter amendment the state is vested with power to enact such legislation. It says "It is true that stress was laid in the opinion in that case (Paul vs. R. R. Co.) on the fact that in the constitution of the state the power to amend corporate charters was reserved to the state and it is asserted that no such provision exists in the present case. It is also true that inasmuch as the right to contract is not absolute in every matter but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within well defined limitations, extend over corporations outside and regardless of the power to amend charters, citing

Atchison vs. Matthews, 174 U. S. 96.

The same question was broached in the first case carried to the Supreme Court of the United States to test the validity of a statute abolishing the fellow servant rule in actions against Railway Companies. To the objection that the statute was in violation of the Fourteenth Amendment.—Field J. speaking for the court, replies: "The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed. It has no application to past injuries and *it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by the laws shall conduct their business in the future where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state.*"

Mackey vs. R. R. *supra*.

Virginia D. Co. vs. Crozer, 90 Va. 126.

(4) Nor does the fact that the corporation is the creature of another state afford it any advantage in this respect.

Hooper vs. California, 155 U. S. 648.

Ins. Co. vs. Daggs, 172 U. S. 557.

Dayton vs. Barton, 183 U. S. 23.

148 In the Hooper case the court sustaining the validity of a statute requiring insurance companies to pay the full sum insured in case of loss, any condition or stipulation of the contract to the contrary notwithstanding, says "That which a state may do with a corporation of its own creation it may do with foreign corporations admitted into the state. * * * The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations." Subject alone to the condition that the regulation imposed does not operate upon interstate commerce or otherwise violate the provisions of the federal constitution, the power of the state to prescribe the terms on which foreign corporations may do business within its jurisdiction is unlimited. The fact that the corporation is engaged in interstate commerce does not exempt it from control by the state in respect to all business done therein not directly connected with traffic between the states. For instance the local statutes pertaining to the duty to fence railway tracks; imposing liability for live stock killed by moving trains or for damages by fire set out by engines; regulating speed of trains within city or yard limits; abolishing the fellow servant rule; requiring the redemption of unused tickets; and regulating contracts of employment, are no less applicable to foreign corporations engaged in interstate commerce than to domestic corporations doing only a local business.

Smith vs. Alabama, 124 U. S. 465.

R. R. vs. Alabama, 128 U. S. 96.

Wifong vs. R. R. 116 Iowa 551.

R. R. vs. Murphy, 116 Ga. 870.

R. R. vs. New York, 165 U. S., 631.

State vs. R. R. 133 Ind. 85.

Geer vs. Connecticut, 161 U. S. 519.

R. R. vs. Dolan, 169 U. S. 133.

(5) Considered from the stand point of precedent alone we think the weight of the better reasoned cases support the conclusion at which we have arrived. Such is the manifest force and effect of most of the cases already cited. The following additional precedents selected from the many found among the decisions of recent date indicate something of the extent to which the power to

149 regulate and restrict the right of contract, and more especially between employer and employee, has been upheld. In citing them it is proper to suggest that the decision of the question before us does not require us to adopt all the conclusions reached in these cases or all of the reasoning on which they are based. They are in point however as illustrating the trend of judicial thought, and the gradually extending application of the police power in the interest of the general welfare.

In Maryland a statute requiring operators of coal mines to pay the wages of employees in money and at stated intervals, and restricting the right of operators to contract for payment of such wages in merchandise has been upheld.

Schaffer vs. U. M. Co. 55 Md. 74.

A similar statute in Indiana has been held valid.
Hancock vs. Yaden, 121 Ind. 366.

The same court in a very recent case sustains the validity of a statute which prohibits the assignment of claims for wages not yet earned.

International Co. vs. Weissenger, 160 Ind. 349.

A statute of the United States making it unlawful to pay any seaman wages in advance or to pay such wages to any other person on a seaman's account, and providing that such payment in advance shall not absolve the employer from full payment after the wages have been earned, is held not to invade any right guaranteed by the Fourteenth Amendment.

Patterson vs. The Eudora, 190 U. S. 169.

The court by Brewer, J. there says: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract yet such liberty is not absolute and universal. It is within the undoubted power of the government to restrain some individuals from all contracts as well as all individuals from some contracts. It may deny to all the right to contract 150 for the purchase of lottery tickets; to the minor the right to assume any obligations except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and indeed may restrain all in any employment from any contract in the course of employment which is against public policy. The possession of this power in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor services or property."

Statutes have been sustained which invalidate contracts to waive homestead and exemption laws.

Curtis vs. O'Brien, 20 Iowa 376.

Knette vs. Newcombe, 22 Ind. 249.

Maloney vs. Newton, 85 Ind. 365.

A debtor cannot waive stay of execution by contract.

McLane vs. Elmer, 4 Ind. 239.

Parties may be required to insert the words "given for a patent in promissory notes given upon such consideration.

New vs. Walker, 108 Ind. 365.

Herdie vs. Roesaler, 109 N. Y. 127.

Parties may be prohibited from contracting to pay attorney's fees for the collection of a claim against them.

Churchman vs. Martin, 54 Ind. 380.

In Vermont it has been held that a statute which forbids a railway employee to contract to assume the risk of a hazardous appliance or unsafe place to work is not unconstitutional.

Kirkpatrick vs. R. R. Co. 74 Vt. 288.

Stafford, J. speaking for the court says "If the doctrine of assumption of risk is to be regarded as contractual then we hold that the statutory protection cannot be bought and sold, but the policy of the law forbids it in the interest of public welfare." * * * "The legislature understood this and the act we are considering was an attempt to better the condition of that very class by compelling the employers to yield something of profit in the interest of humanity and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us that a court should be

151 very slow to construe the beneficial purpose out of such a law or to make it of no effect. On broad lines of public good and social progress it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people."

Massachusetts having already a statute requiring certain corporations to pay their employees in money in weekly installments, its legislature submitted to the supreme court of that state the question whether such provision could be constitutionally extended to private persons and partnerships. To this inquiry the court responded and after citing approvingly many of the cases we have already mentioned and the many statutes regulating and restricting liberty of contract announced the conclusion that such legislation is not a violation of any constitutional guaranty.

Re House Bill No. 1230 163 Mass. 589.

A provision prohibiting all sales of corporate stocks to be delivered in the future, is not a violation of the Fourteenth Amendment although its prohibition includes bona fides as well as gambling transactions.

Otis vs. Parker, 187 U. S. 606.

In support of this holding it is said. "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep seated conviction on the part of the people concerned as to the policy required. Such a deep seated conviction is entitled to great respect. If the state think that an admitted evil cannot be prevented except by prohibiting a calling or a transaction not in itself objectionable, the courts cannot interfere unless in looking into the substance of the matter it is a clear unmistakable infringement of rights secured by the fundamental law."

From a general review of the authorities Mr. Freund says:
Police Power Section 502-503:

152 "The general principle of police regulation of the liberty of contract may perhaps be formulated as follows:—When a contractual relation is voluntarily entered into, rights and obligations which are conformable to the nature of the relation may be defined by law and made conclusive upon the parties irrespective of the stipulations attempting to set them aside, especially where such stipulations involve the waiver of valuable present rights

or where they are virtually imposed by one party without power of choice on part of the other."

The case of *Peel Splint Coal Co. vs. West Virginia*, supra, affirms the validity of a statute prescribing the manner of weighing coal in determining the amount of a miner's earnings and forbidding payment in scrip or store orders. It is true that this affirmance was by a divided court, but the opinion is so well argued and so well supported by reason and authority that no one desiring to master the learning of the law on this subject should fail to examine it. Moreover the principle there upheld having since been fully settled as authoritative by the Supreme Court of the United States in *Harbison vs. Tennessee*, supra, the opinion is entitled to rank as authority notwithstanding the division of the court by which it was pronounced.

As a fitting conclusion to this examination of authorities we quote from the opinion in *Aitkin vs. Kansas*, 191 U. S. 207, sustaining an act making it unlawful for any contractor engaged upon a work of public improvement to require or permit an employee to work more than eight hours per day. "If it be said that a statute like the one before us is mischievous in its tendencies, the answer is the responsibility therefor rests upon the legislature and not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary abandoning the sphere assigned to it by the fundamental law should enter the domain of legislation and upon the grounds merely of justice and reason annul statutes that have received the sanction of the people's representatives." As bearing generally upon the extent to which the police power may restrict the liberty of contract see:

- 153 *Re House Bill*, 147; 48 Pac. 512.
 White vs. Reservoir Co. 22 Colo. 191.
 Cook vs. Howland, (Vt.) 50 L. R. A. 338.
 Com. vs. Crooman, 164 Pa. St. 306.
 Com. vs. Mfg. Co. 120 Mass. 385.
 Sweeny vs. Hunter, 145 Pa. St. 363.
 Kriebolm vs. Young, 55 S. W. 261.
 Naglebaugh vs. Harder, 21 Ind. App. 551.
 State vs. Crescent Co. 83 Minn. 284.
 State vs. Moore, 104 N. C. 714.
 Richardson vs. R. R. 46 S. W. 785.
 State vs. Wagner, 77 Minn. 483.
 Firmshire vs. Mack, 40 Pa. St. 387.
 Eaton vs. Kegan, 114 Mass. 433.
 Davis vs. State, Ala. 68 Ala. 58.
 Act of Congress June 26, 1884, construed in case of the
 Edwin 28 Fed. 255.
 Higgins vs. Graham, 143 Cal. 131.
 Johnson vs. Spartan, (S. C.) 47 S. E. 695.
 Bowlby vs. Koine, 63 N. E. 724.
 Purdy vs. R. R. 162 N. Y. 49.
 Wheeler vs. Russell, 7 Mass. 258.
 Eaton vs. Kegan, 114 Mass. 433.

Karnes vs. Ins. Co. 46 S. W. 166.
 Breckbill vs. Randall, 102 Ind. 528.
 Butler vs. Chambers, 36 Minn. 671.
 Graham vs. Lumber Co. 80 S. W. 799.
 Hotel Co. vs. A. B. Co. 54 C. C. A. 165.
 Munn vs. Illinois, 94 U. S. 113.
 R. R. Co. vs. Wilson, 4 Tex. Cit. App. 568.
 Booth vs. Illinois, 184 U. S. 425.
 Skinner vs. Garnet M. Co. 96 Fed. 735.
 Garnett vs. W. U. Tel. Co. 83 Iowa 257.
 Miller vs. R. R. 65 Fed. 305.
 Squire vs. Tellier, 185 Mass. 18.
 Carroll vs. Ins. Co. 26 Sup. Ct. Rep. 68.
 State vs. Wilson (Kan.) 47 L. R. A. 71.
 Warren vs. Sohn, 112 Ind. 213.
 Reilly vs. Ins. Co. 43 Wis. 439.
 Ins. Co. vs. Leslie, 24 N. E. 1072.
 Walp vs. Lamkin, 57 At. Rep. 277.
 State vs. Reynolds, 58 At. Rep. 755.

Whether the appellee's Relief Department is in the nature of a scheme for insurance and therefore peculiarly subject to supervision and regulation by the state has been suggested, but not argued by counsel.

In the Donald and Maine cases we held that said department was not an "Insurance Company" within the meaning of our laws governing such corporations and expressly refrained from any further expression of opinion. That an organization may do an insurance business without being an "insurance company" within the meaning of the statute is settled; as is also the further proposition that it is the nature of the business rather than the form of the organization by which it is carried on, which justifies the state in exercising supervision over it.

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Martin vs. Stubbing, 126 Ill. 387.
 Burlington etc. vs. White, 41 Neb. 662.
 Grimes vs. Legion of Honor, 97 Iowa 315.
 State vs. Miller, 66 Iowa 26.

But whether the Relief Department is of that character we do not now undertake to say.

We are aware that the courts are not in entire unison as to the extent to which the police power of the state may properly be exercised, and that cases are quite numerous which lend color if not support to views advanced by the appellee herein. The lack of harmony is in some instances more apparent than real.

For instance the cases from Pennsylvania have been decided under a state constitution differing very widely from our own.

See Pa. Const. Art. 3 Sec. 7.

With a single exception none of the cases in which courts have sustained the validity of relief department contracts has involved the

question whether such contracts may be regulated or prohibited by statute. They have simply considered the general proposition whether in the absence of statute the contract should be held void on grounds of public policy, and upon that question they coincide with the views of this court in *Donald vs. R. R.* and *Maine vs. R. R.* supra. The exception to which we have referred is *Shaver vs. R. R.* 71 Fed. 931, where a trial court held a statute of Ohio to be unconstitutional. The statute there considered differs in material respects from our own, and we may further say that if the argument employed by the court in support of its conclusion is to be construed as announcing the doctrine in support of which it is here cited by counsel we think it is not to be approved. Moreover the *Shaver* case is in effect overruled or at least discredited by *Pierce vs. Van Dusen*, 78 Fed. 693.

155 But we freely concede that after eliminating all merely apparent conflict in the cases, not a few others remain in which no amount of ingenuity can reconcile and only confusion could result from the attempt. This court has not before been called upon to consider the central question in the form now presented, and while recognizing the divergence in the authorities, we felt at liberty to follow the precedents which appear to us most persuasive and authoritative, and uphold that which appeals to our judgments as the sounder doctrine.

It is urged upon our attention that the relief fund contract is not unfair in its terms and that the practical working of the plan is beneficial to the employees. All this may be true but it is a consideration to be addressed to the legislature and not to the court. The contract is not assailed because of its oppressive character, but because the statute forbids its use as a defense in an action to enforce a statutory liability.

Nor need we dispute the proposition that a plan of economical insurance against sickness, injury and death is much to be commended, and we can readily conceive that members of the relief department may find it a valuable resource under many circumstances. We may also admit that in the absence of a statute forbidding it the company is not to be censured from making any legal contract which it is able to negotiate with its employees to protect itself from liability for damages.

But none of these are controlling considerations. The legislature does not in this act forbid or place any obstacle in the way of such insurance nor does it forbid or prevent any settlement of the matter of damages with an injured employee fairly made after the injury is received. On the contrary, the right to make such settlement is expressly provided for in the amendment to Code section 2071. The one thing which that amendment was intended to prevent was the use of this insurance or relief, for which the employee has himself paid in whole or in part, as a bar to the right which the 156 statute has given him to recover damages from the corporation. And this, as we have already said, is clearly within the legislative discretion.

Nor does it work any hardship to the railway Company. The hardship, if any exists, is in the creation of the liability (the validity of which legislation is now beyond question) and not in the statute which prevents its circumvention.

We do not attempt the review of any of the foregoing questions with special reference to our state constitution. The provisions relied upon by counsel are those which announce the right of all persons to acquire, possess and protect property, and require all laws of a general character to have uniform operation, Constitution of Iowa, Article 1, Sections 1 and 6. The rules there expressed do not differ materially in effect from those embodied in the Fourteenth Amendment to the Federal Constitution. Certainly they place no narrower restriction upon the legislative power.

The discussion already had embraces all which need be said upon this branch of the case, and we hold that the objection to the statute as being in contravention of our state constitution must be overruled.

The dissent from this conclusion prepared by Ladd, J. and filed herewith rests in its final analysis upon two propositions.

1st. That although it would have been within the constitutional powers of the legislature in originally enacting Code Section 2071 to have protected the right thereby created by a provision such as is contained in the amendatory act of the Twenty Seventh General Assembly, yet the right having been in fact created without it, the subsequent addition of such protection is an unconstitutional discrimination against the railway company; and

2nd. That the classification by which railway companies alone are made subject to such statutory restrictions is arbitrary and unreasonable and is therefore unconstitutional and void.

The first of these propositions, that a provision which could have been constitutionally embodied in the original act cannot be constitutionally added by amendment, is one for which we
157 can find neither authority nor precedent and is in our judgment indefensible in principle. Indeed it would seem that the very statement of the doctrine is its own sufficient refutation. To adopt such a rule is to say that by the creation of any statutory right or liability the state exhausts its constitutional power to legislate upon the subject, save perhaps to repeal the statute. Most assuredly this cannot be correct. If one General Assembly may create a homestead or exemption right and protect it by a provision that no waiver of such right shall be of any validity unless expressed in a given manner and form; or may provide a lien to secure to certain classes of labor the payment of their wages; or may abolish the general rule as to contributory negligence in actions against railway companies for damages by fires, or may abolish the rule as to assumption of risk by railway employees injured because of the company's neglect to equip its cars with automatic couplers and brakes; or may enact any of hundreds of rights and liabilities such as are to be found upon nearly every page of our statute books, may not the next general Assembly amend each and every one of these acts to remedy defects which experience has developed in them or to increase their efficiency, or to prevent the destruction of a right

or the avoidance of a liability so created? For instance Code Section 2083 provides that any employé who may be injured by the running of a car or engine without automatic brakes and couplers as provided by law shall not be considered as waiving his right to recover damages by continuing in the employ of the corporation. This provision was first enacted by the Twenty Third General Assembly. Let us suppose that a subsequent General Assembly had amended said section by a further provisions that the plaintiff in such case should not be required to negative contributory negligence on his part, would we hesitate for an instant to hold such an amendment was clearly a constitutional exercise of legislative power? In the very nature of governmental and legislative power the authority to create a statutory liability or right of action implies of necessity the right of amendment. The only conceivable

158 exception to this rule is a case where the original statute is in the nature of a grant or contract within the rule of the Dartmouth College case. That famous precedent has been made a house of refuge for many theories, but its shelter has never been held broad enough to cover a case like this. The legislature has seen fit to impose a peculiar liability upon railway companies in favor of a particular class of employees whose service exposes them to peculiar dangers. That it is not an unconstitutional discrimination has time and again been declared by our courts of last resort. If this be so by what specious method of reasoning shall we justify ourselves in holding that this constitutional power may not be exercised in amendment as well as in original legislation? It violates no contract right. It disturbs no vested right. There is no pretense that the contract pleaded in the appellee's answer was entered into before the amendment was enacted.

Says the Supreme Court of Wisconsin: "No principle of law is better settled than that whatever is given by statute may be taken away by statute, except vested rights acquired under it and except also that the statute must not be in the nature of a contract on part of the legislature."

State ex rel. vs. Hoefflinger, 31 Wis. 263.

If the power to abolish or to take away a statutory right is an essential attribute of the legislative authority is not the power to modify or amend equally broad and equally clear? Under the reserve power of the state to regulate and control corporations and to amend charters it has often been held that whatever regulation or restriction might lawfully have been included in the original charter may be imposed by subsequent legislation.

Sinking Fund cases, 99 U. S. 700.

R. R. Co. vs. Sioux City, 78 Iowa 746.

R. R. Co. vs. Williams, 103 Ky. 378.

Stanislaus vs. San Joaquin, 192 U. S. 212.

For still stronger reason must we hold that as respects a statute which contains no grant or franchise or other element of contract, and on which no claim of vested rights can be grounded, the power of amendment is no less broad and universal than is the power to

159 create and repeal. When therefore the appellee herein employed the appellant and at the same or subsequent time procured his agreement to the benefit scheme, this law was in existence in its present form and by an elementary rule of construction the contract must be read as if the terms of the statute were embodied in it. While its right to go into the labor market and hire servants upon terms of equal advantage with other railway corporations was a property right of which the company could not be lawfully deprived, it had no legal right to exact terms which the law forbade to all such employers, and having exacted them it must be held to have done so with knowledge that the courts would not enforce them for its benefit. It was its privilege perhaps to speculate upon the possibility of securing a ruling invalidating the statute or upon the reluctance of its employees to insist upon their rights under the statute and thereby to a greater or less extent get the benefit of its practical nullification, but it is in no position to complain if, when the test is applied, it is held to the full measure of liability which the law making power has rightfully imposed upon it.

Concerning the second proposition that the amendment to Code Section 2071 makes an unreasonable discrimination against railway companies as employers, as well as between different classes of employees it is to be said that this is neither more nor less than a revival of the objection which has been raised against every legislative measure which has ever been enacted for the benefit or relief of any special class of employees and in practically every instance been overruled by the courts of last resort. To hold with appellant on this proposition is to attempt to reverse the entire current of the decisions of our own court, of courts of sister states, and of the Supreme Court of the United States.

Kane vs. R. R. Co. (C. C. A.) 68 L. R. A. 790.

Herrick vs. R. R. 31 Minn. 11.

R. R. vs. Herrick, 127 U. S. 210.

R. R. vs. Mackey, 127 U. S. 205.

R. R. vs. Montgomery, 152 Ind. 1.

R. R. vs. Paul, 173 U. S. 404.

Holden vs. Hardy, 169 U. S. 366.

State vs. Brown, 18 R. I. 16.

Harbison vs. Iron Co. 53 S. W. 955.

Kilpatrick vs. R. R. 74 Vt. 288.

Patterson vs. Endora, 190 U. S. 169.

Hancock vs. Yates, 121 Ind. 366.

Schaffer vs. U. M. Co. 55 Md. 74.

160 Tullis vs. R. R. Co. 175 U. S. 348.

Pierce vs. Van Dusen, 78 Fed. 693.

and numerous other cases hereinbefore cited. In the Pierce case supra, Mr. Justice Harlan says that as the statute applies to all railroads operating in the State it is general in its nature within the meaning of the Constitution and as it applies alike to all of a given class of employees it operates uniformly—and is therefore not unconstitutional. This language affords a complete answer to the second ground of the dissent herein.

The assertion that the amendment to Code section 2071 "does not purport to deal with the company's liability at all" and that "the contract contemplated has no bearing on the liability of the railroad company to its employé" is irreconcilable with the clear and express language of the statute. The amended section provides in so many words that under certain circumstances the company shall be liable in damages to its employé and that in such case no contract of insurance, relief, benefit or indemnity, nor the acceptance of such insurance, relief, benefit or indemnity, shall be available to the company as a defense to an action by the employé for the recovery of such damages. How can it be said that this provision which eliminates a defense which might otherwise be successfully asserted has "no bearing" on the company's liability? Does not such a provision which means all the difference between a right of recovery and no right of recovery "purport to deal with the company's liability."

If then, as has been settled beyond all controversy, the power exists in the state to create rights and liabilities for the benefit of employees engaged in the use and operation of railways which are not given to other classes of employes, it is not for this court to say that the legislature may not properly and constitutionally make special provisions by which those rights may be preserved and those liabilities made effective.

It is entirely too late in the day to insist that special legislation affecting the rights and liabilities of railway companies or other distinct class or kind of corporations constitutes a denial of the equal protection of the laws simply because the same regulation or restriction is not extended over other corporations or other kinds of business.

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R. R. Co. vs. Matthews, 165 U. S. 1.

Tullis vs. R. R. 175 U. S. 348.

R. R. vs. Pontius, 157 U. S. 209.

R. R. vs. Paul, 173 U. S. 404.

Ins. Co. vs. Daggs, 172 U. S. 557.

Fidelity vs. Mettler, 185 U. S. 308.

Duncan vs. Missouri, 152 U. S. 377.

R. R. vs. Backus, 154 U. S. 421.

R. R. vs. Herriek, *supra*.

R. R. vs. Beckwith, 129 U. S. 26.

R. R. vs. Dugan, 109 Ill. 537.

R. R. vs. Dey, 82 Iowa 312.

Gano vs. R. R. 114 Iowa 719.

Cameron vs. R. R. 63 Minn. 384.

R. R. vs. Simmonson, 64 Kan. 802.

Ins. Co. vs. Dobney, 189 U. S. 301.

Ins. Co. vs. Lewis, 187 U. S. 335.

Campbell vs. R. R. 121 Mo. 340.

State vs. Nelson, 52 O. St. 88.

R. R. vs. May, 194 U. S. 267.

R. R. vs. Snell, 193 U. S. 30.

The demurrer to the appellee's answer should have — sustained. The ruling and judgment of the district court are reversed and cause remanded for further proceedings not inconsistent with this opinion.
Reversed.

162 LADD, J. (dissenting):

I cannot yield my assent to the conclusion reached by the majority. I am of the opinion that the amendment to Section 2071 of the Code, enacted by the Twenty-seventh General Assembly, is in plain and palpable violation of those portions of the federal and state constitutions prohibiting class legislation, and will in as brief a way as practicable state my reasons for so thinking.

The general rules applicable to the case are correctly stated in the opinion of the majority and need not be repeated. The difficulty arises in their application.

The section before amendment read: "Every corporation operating a railway shall be liable for all damages sustained by any person including employés of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employés thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

This statute merely does away with the common law rule that the master is not responsible for the negligence of a fellow-servant engaged in the use and operation of a railroad, which results in damage to another employé injured, when his employment exposed him to the hazards of such use and operation. A cause of action is created in favor of a class of employés whose work exposes them to the perils peculiar to railroading. The legislation is not in the interest and for the protection of all railroad employés, but for one class of them, a mere fraction of the entire body. This was noted in *Deppe vs. Railroad Company*, 36 Iowa 52, where, in order to uphold the constitutionality of the law as it then stood, when assailed as class legislation, the court limited the employés to those operating a railway, saying:

163 "The manifest purpose of the statute was to give its benefits to employés engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional."

The soundness of this decision was questioned in *Malone vs. Ry. Co.* 61 Iowa 326, but it was approved in the same case, reported in 65 Iowa 422, wherein it is said: "To meet the objection that the act of 1862 created a rule of liability which was applicable to railroad companies alone, and did not affect other employés under precisely the same circumstances, and that it was, therefore, class legislation, and in violation of the state constitution, the court in *Deppe's case* construed the act as creating a remedy only in favor of that class of employés who were engaged in the hazardous business of operating

railroads, and the correctness of the holding of that case on that question is not doubted."

See also *Connors vs. Ry. Ry. Co.*, 111 Iowa 387.

The same thought was expressed by the Supreme Court of Minnesota in *Johnson vs. Ry. Co.*, 45 N. W. 156, where speaking through Mr. Justice Mitchell, in referring to a previous case, declaring that a similar statute in that state must be construed as designed exclusively for the benefits of those who would in the course of their employment be exposed to the peculiar hazards incident to the use and operation of railroads, it said: "If the distinction is to be made as to the liability of the employers, and employes, it must be based upon a difference in the nature of the employment, and not of the employer. One rule of liability cannot be established for railway companies merely as such, and another rule for other companies under like circumstances and conditions. Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class "if all persons brought under its influence are treated alike under the same conditions." But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if the distinction is to be made between railway corporations and other employers as respects their liability to employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists."

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In passing on a like statute in *Chicago, Kansas & Western Railway Company vs. Pontius*, 157 U. S. 209, the Supreme Court of the United States based its approval of the decision of the Supreme Court of Kansas in the same case, reported in 52 Kans. 264, 34 Pac. 739, on the same ground saying: "the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to a railroad corporation having for its object the protection of their employes as well as the safety of the public." As the fellow-servant law applies only to a certain well defined class of railroad employes and excludes all others, the majority are certainly mistaken in suggesting that the mere fact that the employer must be a railway company is controlling in the matter of classification. The reason for sustaining the original section, as seen, was the hazardous employment of those for whose protection it was enacted. It operated upon all who might be injured while engaged in an occupation of peculiar peril. A right of action is given, when, but for the statute, none would have existed. All other employes of the railroad companies are excluded from its operation. The difference in their situation was regarded to be such as to warrant separate legislation applicable to one class and not to the other.

In creating this new liability the legislature guarded against its impairment by adding that "no contract which restricts such liability shall be legal or binding." This law stood on the statute book without any material change for thirty six years. In the meantime

causes of action created thereby were shielded by no protective legislation other than that accorded those arising otherwise or possessed by the class of railroad employes not exposed to the peculiar perils incident to the use and operation of railroads. Was there anything in the nature of this statutory right of action or the class of persons to whom it was made available which so differentiated it from
 165 other rights of action or from other classes of employes that separate and distinct legislation might be demanded for the protection of it or the class for whom it was created? Certainly the origin of the right can furnish no sound reason for its separate classification. A cause of action is no more nor less sacred when created by statute than it would be had it existed at common law; and in order that legislation with respect thereto not applicable to other causes of action may be sustained, there must be some ground for such discrimination. It is not enough that the amendment might have been permissible in the enactment of the original statute a third of a century ago. The conditions which will justify the separation of subjects into different classes for the purpose of legislation must have relation to the time when it is enacted. Otherwise the constitutional inhibition of class legislation may be defeated by a classification based solely on past events having no connection with the needs of the hour or the demands of the present generation.

In *State vs. Garbroski*, 111 Iowa 496, the classification was condemned because it rested "on a past and completed transaction having no relation to the particular legislation enacted. All citizens are divided," said the court, "into two classes—those who served in the army and navy thirty five years ago, and all those who did not. In present conditions and circumstances, there are no difference between them in their relation to society and the administration of the law and other citizens of the state. * * * Equality in right, privilege, burdens and protection is the thought running through the constitution and laws of the state; and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in conditions or circumstances, is opposed to the spirit of free government and expressly prohibited by the constitution."

If there is some present difference between causes of action which arise by virtue of the statute enacted thirty-six years before any protection was attempted, and those arising in favor of other employes of a railroad company by virtue of those natural principles of justice which have been recognized for so long a time that
 166 the memory of man runneth not to the contrary, or if there is anything in the genesis of either, or if there are such distinctions between the classes of employes entitled thereto respectively, these have not been pointed out, and I assert, without fear of successful contradiction, they cannot be. True, a statute may be amended, and when this has been done it will be read with the amendment and both construed prospectively as though they had been enacted at the same time. This, however, is merely a rule of construction.

Endlich on Statutes, Sec. 297.

But this in no way obviates the fact that the amendment may constitute distinct and independent legislation to be construed in connection with the original only from the time of its adoption.

Ely vs. Holton, 15 N. Y. 595.

Its validity must be determined as of the time of its enactment and in the light of circumstances and conditions then existing, of if not existing, then having relation to the present and to the particular legislation.

Let us examine this amendment remembering that it is applicable to but the one class of employes. For convenience it may be set out; "Nor shall any contract of insurance, relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received." If this can be said to restrict in any way the liability of the company, it adds nothing to the original statute, for it declared any such contract invalid.

But it purports to deal not with the company's liability but with its enforcement. It relates, first, to an independent and
167 different subject, namely, to contracts of "insurance, relief, benefit or indemnity," invalidating them as to both parties; and second, to the remedy in declaring that acceptance of the above shall not operate as a bar or defense to an action for an injury suffered. The contract contemplated does not affect the liability of the railroad company; its only relation to the original act is the fact that both concern the same class of employes. Nor does the portion with respect to the acceptance of benefits in any way restrict the liability of the company. Donald vs. Ry. 93 Iowa 284. Its only relation to the statute as it stood is that it protects the cause of action thereby created from waiver involved in the election of remedies. That such election as between any insurance, relief, benefit or indemnity that may be stipulated, any recovery of damages against the railroad company, is essential to avoid restricting its liability in violation of the original act, was pointed out in Donald's Case. The requirement of an election between remedies is not restrictive of the right to either, and the only effect of the second portion of the amendment is to declare that an election to take insurance, relief, benefits, or indemnity, will not estop the injured party from availing himself of the other remedy, that is, prosecuting his cause of action against the company. In other words, this amendment has no connection with the original act further than that it concerns the same class of employes and declares that a certain election of remedies shall not constitute an estoppel of the cause of action therein created. I shall not stop to discuss whether these are so germane to the subject of the section of the code before being

amended as that the title to the amendment was sufficient. It is enough for present purposes that the amendment does not limit in any way nor add to the duties imposed or liabilities created by that section.

It merely accepts the classification of that statute as the basis of legislation upon different subject matter, namely, contracts with reference to insurance, etc., and the effect of accepting there-
168 under as constituting an estoppel. Surely these are not so connected with the object and purpose of the original act that the amendment can be upheld because based on the classification there recognized. The subjects covered by the amendment were just as important to railroad employes not exposed to the peculiar hazards of operating trains, and precisely as applicable to their situation and condition. Why invalidate insurance or relief contracts of the former and enforce those of the latter? Why give effect to the acceptance of benefits by the latter as an estoppel against the prosecution of a cause of action against the employer, and not do so when the acceptance is by the former? If there is "some apparent natural reason—some reason suggested by necessity—by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them," it has not been mentioned in the opinion of the majority. The fundamental defect in the amendment is that it does not bring "Within its influence all who are under the same conditions." The conditions under which the injuries are received can have no bearing on the question as to whether one shall be bound by a waiver of his right to maintain his cause of action by reason of some contract of insurance relief, benefit, or indemnity, and another shall not. Both stand in the same relation to the company. Notwithstanding this amendment declares with respect to the employe within the fellow servant act that receiving benefit of such a contract shall not be a bar to the maintenance of an action against the company; while receiving the benefits by a servant within the terms of that act, may be a bar to any further recovery. There is no ground for thus discriminating between the employes of the same corporation, and such classification is arbitrary and unreasonable.

The facts of this case will very well illustrate the inequality of the law. The benefits of the defendant's relief department are not restricted to any class of employes; all may become members. Nor are these limited to injuries for which the company might be liable.

All manner of injury, as well as sickness, is included. "In
169 case of injury to a member, he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of this relief department." But acceptance of the benefits is made a bar to the maintenance of an action against the company, as is also the maintenance of such action a bar to any claim for relief. That is, a member must elect whether he will take the benefits stipulated by the regulations of the department, or rely on redress in the courts for his injuries. The

plaintiff, though he had contributed but eighty five cents to the relief fund, and had expressly agreed to all the conditions, accepted benefits to the amount of \$492.00 and \$330.00 paid to his physicians, and then in disregard of said conditions instituted this action. As he had been exposed to the peculiar hazards of railroading, taking this money did not bar his right to recover from the defendant, if the amendment to the statute is valid. Had he suffered like injury while engaged in some of the other employments of the company, the amendment would not apply, and under the decision in *Donald vs. Railway*, 93 Iowa 284, election to take the benefits of the relief department would have been final, and he could not maintain the action. Is this equality before the law? The difference in the employments could by no possibility furnish ground for a distinction. What difference can there be when it comes to the matter of settlement of claims between one of the train men and the company, growing out of the alleged negligence of a co-employé in the train service, and the claim of a shop man, growing out of the negligence of the master or vice-principal in that department? None whatever, for the manner of the injury has no relation to the subjects touched by the amendment. Nor is there any very satisfactory reason for making such a law applicable to railroad companies, and not to manufacturing and other corporations within the state. It would not seem that there is anything peculiar about railroad companies which should deprive them or their employés of the advantage
 170 of injury or death of their employés when such advantage is accorded to other corporations and their employés in the adjustment of the claims between them.

The only difference which might support separate legislation which suggests itself is the public character of the common carrier and the possible tendency of the relief department, by obviating burdens involved, to lessen the vigilance and care of the railroads essential to the safety of the public. If this were so (and it is to be said that in so far as indicated by the record it is purely imaginary), it would furnish no ground for the distinction between employés of the same company. The safety of the public is quite as dependent on the diligence and foresight of the great body of men doing the work of railroads in positions not exposing them to the dangers of moving trains as of those who are thus exposed.

The inclusion of railroad companies only in a class to be affected by statute has sometimes been upheld, not because the subjects to be affected are railroad companies, but owing to the character of their business, the peculiar nature of the risks included, or the nature of their property. Thus special laws with reference to the assessment and taxation of property have been sustained, owing to difference in the nature of railroad property.

Taylor vs. Secor, 2 Otto, 575; 23 L. Ed. 663.

Pittsburg, C. C. & St. L. R. R. Co. vs. Backus, 157 U. S. 429; 39 L. Ed. 1041.

An examination of the decisions generally will demonstrate that something more tangible than a mere name, business or purpose of

a corporation is exacted by the courts as a basis of classification. There must be some connection between the legislation and the subjects upon which it operates, and within the latter must be included all subjects in like situation and circumstances.

An instructive case is that of *Gulf, Colorado & Santa Fe R. Co. vs. Ellis*, 165 U. S. 150; 41 L. Ed. 666. The legislature of Texas had enacted a statute providing that where a claim in certain instances against a railroad company, not exceeding in amount \$50.00, shall be presented to the company, supported by an affidavit, and if the company fail to pay the same within thirty days, a recovery may be had, and an attorney fee of \$10.00 shall be
171 "Assessed and awarded by the court or jury trying the issue."

This was denounced as class legislation, and the court, speaking through Mr. Justice Brewer, said:

"No individuals are thus punished and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no other. They are not treated as other debtors or equally with other debtors. They can not appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in failure they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the court upon equal terms * * *

Before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in a like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore, upon them special burdens may be imposed, it is sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroad- of all corporations are selected to bear this penalty. The rule of equality is ignored. It may be said that certain corporations are chartered for charitable, educational or religious purposes, and abundant reason for not visiting them with a penalty for the non-payment of debts is found in the fact that their chartered privileges are not given for a pecuniary benefit. But the penalty is not imposed upon all business corporations or chartered for the purpose of private gain. Th- banking corporations, the manufacturing corporations and others like them are exempt; further, the penalty is imposed not upon all corporations charged with quasi public duty of transportation, but only upon those charged with a particular form of duty. So the classification

172 is not based upon any idea of special privileges by way of incorporation nor for special privileges incurred thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties. * * * But if the classification is not based upon the idea of special privileges can it be sustained upon a basis of business in which the corporations to be punished are engaged? That such corporations may be classified

for some purposes is unquestionable. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties,—duties arising out of the peculiar business in which they are engaged,—is a just classification, and not one within the prohibition of the 14th amendment. Thus it is frequently required that they fence their tracks, and as a penalty for failure to fence, double damages in case of loss are inflicted.

Missouri P. R. Co. vs. Humes, 115 U. S. 572; 29 L. Ed. 463. But this and all kindred cases proceed upon a theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged,—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state or by double damages to a party injured is immaterial. It is all done in the exercise of the police power of the state and in view to enforce just and reasonable police regulations."

This decision is not impinged by what was said in St. Louis I. M. & S. R. Co. vs. Paul, 173 U. S. 404; 43 L. Ed. 746; where an act of the General Assembly of Arkansas requiring railroad companies upon the discharge of employes to pay the wages due on the day of such discharge, and providing as a penalty for non payment that wages shall continue at the same rate until paid, but not longer than sixty days unless action is begun, was upheld as amendment of the railroad charter. (See same case reported in 62 Am. St. 173 154 and note.) The Ellis case was again adhered to in Atchison, T. & S. F. R. Co. vs. Matthews, 174 U. S. 96; 43 L. Ed. 909, which construed a statute of Kansas declaring the setting out of fires in the operation of a railroad shall be *prima facie* evidence of negligence, and upon recovery authorizing the assessment of a reasonable attorney's fee. This was justified on the ground that its purpose was to secure the utmost care on the part of the railroad companies to prevent the escape of fires from their moving trains. The distinction drawn between it and the Ellis case is rather hazy, and the denunciation of the statute as class legislation by Mr. Justice Harlan, in which three other justice- concurred, seems unanswerable; yet the classification in any event included all companies or individuals operating trains. The Ellis case was again approved in Fidelity Mutual Life Ass'n. vs. Mettler, 185 U. S. 308; 46 L. Ed. 922; in which a statute of Texas enacting that life and health insurance companies upon failure to pay losses within the time specified in their policies after demand made shall pay the beneficiaries "in addition to the amount of the loss 12 per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss." This was put on the ground, first, of the state's power to impose conditions on its own and foreign corporations; and second, on the differences between life and health companies and fire, marine and inland insurance, and also mutual benefit and relief associations and "the necessity of prompt pay-

ment" in order to provide the means of living, of which the beneficiaries have been deprived by the death of the insured," is emphasized.

In my opinion there is no way by which to uphold the amendment to Section 2071 of the code without disregarding the Ellis case and ignoring the necessity of material differences between classes of individuals or corporations to justify the application of different laws thereto. Attention to the question involved in the concrete rather than the abstract can lead to no other result. The amendment nullifies agreements of one class of employes of railroad companies and permits those of another to be enforced.

174 A "Square deal" would exact that all employes be included and each be accorded the same protection by the law. It singles out for protection the claims of a part of those in the service of railroad companies and excludes from its benefits the claims of the remainder and of all employes in the service of all other corporations in like situation. The courts are open to the favored class notwithstanding any contract of insurance, relief, benefit or indemnity and acceptance thereunder, but to all others they are closed. In the words of Mr. Justice Brewer, "they do not enter court on equal terms." What I object to is the discrimination by this statute between men when there is no basis for such discrimination. All in like situation should stand equal before the law. No favoritism should be tolerated. If it is a good law for an employe who operates an engine, it is equally good for the dispatcher who directs the movement of engines and trains. If its enactment is essential for the protection of the brakeman from undue pressure from their employer, it is equally essential to shield the trackmen from the same influence. There is nothing in the situation of the one which will justify extending the protection of a statute like that under consideration for his benefit and denying such protection to the other. "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as mark the objects so designated as peculiarly requiring exclusive legislation. There must be some substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." *State vs. Hammer* 42 N. J. Law 439. The 14th amendment to the constitution of the U. S. prohibits the denial to any person within its jurisdiction the equal protection of the laws. The 6th section of Article 1 of

175 the constitution of this state exacts that all laws shall have a uniform operation and that privileges and immunities shall not be granted to any citizen or class of citizens which upon the same terms shall not equally belong to all citizens. These provisions of the fundamental law, denouncing discrimination, should not be frittered away. Their importance in guarding against the segrega-

tion of society into classes and in assuring to all citizens that equality before the law which is essential to free government cannot be overestimated. The constitutionality of this amendment cannot be sustained save by resort to refinements in distinction and sophistry in reasoning in which no court should indulge and which would be destructive of the above limitations on legislative power. For these reasons I am of the opinion that the district court rightly held the statute invalid. So believing it is unnecessary for me to consider whether it was also violative of a portion of the constitution guaranteeing the freedom of contracts. Since submitting the foregoing the majority have added to their opinion a rejoinder which may be responded to briefly. The assertion that anything which might have been included in the statute as originally enacted may be added by way of amendment is not borne out by the illustrations cited. Thus in case of an exemption or homestead it is quite as essential to the protection of the family that these be preserved as that they be granted and hence protective measure- enacted by way of amendment are supported by the same classification as the original act. The vice in the reasoning lies in the assumption that protective measures have been enacted and sustained regardless of any present requirement of conformation to the provisions of the constitution. In every instance cited the subsequent statute if challenged has been sustained because the class for which enacted was such as to render special legislation appropriate. If the doctrine asserted were to be accepted all necessary in order to avoid the constitutional prohibition against class legislation would be the enactment of a law by way of an amendment to some former statute of ten years or a century ago instead of a new and independent act. Lapse of time and changes in conditions cannot be thus obliterated in determining whether a statute is open to the charge of unjust discrimination and no authority is cited so holding. No one questions the legislative power to abolish, take away or modify statutory rights; all insisted upon is that in doing so the legislature is not independent or superior to the constitution but must accomplish this in the way exacted by that instrument. Here is a cause of action created by statute. It has stood, with respect to the remedy, for thirty six years on precisely the same footing as other causes of action, existing or created before or since. After the lapse of that time it is amended. The liability created by the original statute must not be confused with the remedy which is sought to be affected by the amendment. The liability arises upon the happening of the injury. The amendment does not purport to change it in any way. It in no way restricts the liability previously created. It adds nothing thereto. It relates solely to the remedy. Had it been enacted as part of the original act it would have constituted a part of the right and must have been upheld as valid for being part of the right created the same classification of necessity would sustain it. See *Major vs. Ry.* 115 Iowa 309. *Hawley vs. Griffin*, 121 Iowa 567. But as seen this remedy was not added until long after the cause of action was created and consequently did not become a part of the right. It was a distinct and independent provision for the protec-

tion of a particular cause of action and can no more be upheld than had it related to any other liability created by statute or existing at the common law. Had the subject of its protection been some other liability of a railroad company or individual no question could arise as to whether it should comply with the constitutional requirements of the uniformity and classification. Can it be that the mere fact alone, that a liability has been created by statute will justify a separate and peculiar remedy not available to all persons in like situation? Such is the logical deduction from the opinion of the majority. The legislature may look back one or one hundred years and if perchance the cause of action had its origin in a
177 statutory enactment it may be singled out for a special remedy and this regardless of its similarity with other causes of action or the persons to be affected or the changes wrought by lapse of time. I am not ready to endorse any such theory. I am unwilling to resort to any species of reasoning, having no substantial basis, in order to void the clauses of the constitution denouncing unjust discrimination. Believing that the amendment to the statute is in conflict with the requirements of the constitution, I am of opinion that the judgment of the district court so declaring should be affirmed.

BISHOP, J.:

I concur in the result reached by Ladd, J. upon the views expressed by him.

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Supreme Court of Iowa.

STATE OF IOWA, ss:

Be it remembered, That on the 14th day of July, 1906, the following proceedings, among others, were had in the Supreme Court of Iowa, to wit:

No. 22987.

CHARLES L. MCGUIRE, App'l't.

vs.

THE CHICAGO, BURLINGTON AND QUINCY RAIL ROAD COMPANY.

Appeal from Appanoose District Court.

In this cause, the Court being fully advised in the premises, file their written opinion reversing the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby reversed and set aside and cause remanded for further proceedings in harmony with the opinion of this Court and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellee pay the costs of this appeal, taxed at \$134.00 and that execution issue therefor.

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Record 28, Page 4.

In the Supreme Court of Iowa.

No. 25656.

CHARLES L. MCGUIRE

vs.

C., B. & Q. R. R. Co., App'l'nts.

Appanoose Dist. Court.

JANUARY 14TH, 1908.

Cause continued.

Record 28, Page 23.

No. 25656.

CHARLES L. MCGUIRE

vs.

C., B. & Q. R. R. Co., App'l'nts.

Appanoose D. C.

JANUARY 21ST, 1908.

Motion to set aside order of continuance overruled.

Record 28, Page 102.

No. 25656.

CHARLES L. MCGUIRE

vs.

C., B. & Q. Ry. Co., App'l'nts.

Appanoose D. C.

MAY 6TH, 1908.

App'l'nts' motion to strike part of appellee's additional abstract ordered submitted with the case.

No. 25656.

Record 28, Page 113.

CHARLES L. MCGUIRE

vs.

C., B. & Q. R. R. Co. et al., App'l'nts.

Appanoose D. C.

MAY 12TH, 1908.

Cause submitted on abstracts and arguments on file and motion to strike.

Filed June 9th, 1908.

25656.

CHARLES L. MCGUIRE

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.,
Appellants.

From Appanoos District Court.

Robert Sloan, Judge.

Suit to Recover Damages for a Personal Injury. Trial to a Jury and Verdict and Judgment for the Plaintiff. The Defendants Appeal.

H. H. Trimble, Palmer Trimble, Frank S. Payne, for Appellants.
Howell & Elgin, for Appellee.

SHERWIN, J.:

This is the second appeal in this case. The opinion on the first appeal is reported in 131 Iowa, 340, where a statement of the facts may be found. On the former appeal we held that the plaintiff's demurrer to the answer should have been sustained and reversed the case and remanded it for further proceedings not inconsistent with the opinion. On the last trial in the district court a demurrer to the same subject matter held demurrable in the former opinion was sustained and the appellant assigns the ruling as error. Counsel for appellants concede in argument that the ruling is governed by the former opinion, if the same is adhered to and do no more than to file a brief of points covering their contentions relative thereto. We still think the rule there announced the correct one and that the demurrer herein was properly sustained. See

180 McGuire v. Railway, 131 Iowa, 340.

The appellants ask a reversal for other reasons which we shall presently consider. But before doing so, it will be necessary to pass upon the appellants' motion to strike from the appellee's additional abstract an amendment to the petition which was filed at the close of the evidence. The original petition alleged that the defendants' engineer negligently cause- "said train of cars and said engine to move, thereby bringing the front car and said engine together, or, in other words, by causing a slack of said train's coming against the said engine, that by reason of said moving of said engine, and permitting said slack of said train of about 13 cars to come against said engine" the plaintiff was caught and injured. It was further alleged that "said engineer was negligent in moving said engine, causing said engine and said cars to come together while said plaintiff

was between said cars." The amendment to the petition was as follows:

"The plaintiff states that when he went between the engine and car that the cars were stationary and claims that the engine backed, that is, "moved" causing his injury; that the engineer in so doing was guilty of negligence; plaintiff also while making the claim above, and yet to conform the allegations to any possible phase of the proof already in, states that if it shall be found to be a fact by the jury that the engineer released his air at the time the train stopped, then plaintiff claims that said releasing of the air while plaintiff was between the tender and the car was negligent, and caused plaintiff's injury."

It is not seriously claimed that this amendment to the petition was not filed at the close of the evidence and before argument was begun, but it is contended that it was filed without leave of court and without the knowledge of appellants' counsel. It appears, however, that the filing was regularly entered on the notice book
181 and that it was before the trial judge when his instructions were prepared. It also appears that appellants' counsel either construed the original petition as charging practically the same negligence as the amendment, or saw the amendment before the court's instruction- were prepared, for they requested an instruction which was in the following language:

"There is but one charge of negligence against the defendant in this case to be considered by the jury. That is the charge that defendant's engineer, Gilbert, negligently backed the engine in question against plaintiff while plaintiff was between the engine and car in question trying to turn the angle-cock on the car in question. If you find that said Gilbert did not negligently back said engine against the plaintiff while plaintiff was thus trying to turn the angle-cock, your verdict must be for defendant." It being very clear that the amendment was filed in open court during the progress of the trial; that it was properly entered on the notice book that it was before the trial court and embodied in its instructions, and that it presented an issue that the appellants at least claimed was in the case, formal leave to file the same was not necessary. The motion to strike must be and it is overruled.

The plaintiff was allowed to testify over the objections of the appellants that the metal plate which should have been on the "buffer" or "dead-wood" on the car which the plaintiff was trying to uncouple from the engine was gone and that the car had been battered so that there was a depression in the buffer three inches deep and that he was caught therein. While it is true that the condition of the car was not made the basis of a charge of negligence against the appellants, we think the testimony was competent. The plaintiff had the undoubted right to show the situation he was in when he received the injury complained of and the way in which he
182 was caught. The latter for the purpose of showing his freedom from contributory negligence, if for no other reason. The court told the jury that negligent acts of the defendants were relied upon for recovery, and that — jury could not have thought

the condition of this car was one of them unless it entirely disregarded the instructions, and we are not to presume that it did so. The plaintiff's testimony as to the condition of the angle-cock was competent on the question of contributory negligence. At the close of the testimony, the appellants asked the court to submit to the jury seven special questions. Five of the questions were submitted and answered by the jury and complaint is now made because the other two were not submitted. The fourth request, which was refused was, substantially embodied in one of those submitted, and the third called for a special finding as to whether or not the engineer was negligent. The request was rightly refused because it called for the conclusion of the jury from all of the facts before it.

Lewis v. Railroad Co. 57 Iowa, 127.

Furthermore, it was a request for a special verdict rather than for an answer to a special question.

White v. Adams, 77 Iowa, 295.

There was no error in the twentieth instruction given by the court. It simply told the jury that, if the plaintiff could not move the angle-cock by reaching under the draw-bar, he would not be guilty of contributory negligence, as a matter of law because he attempted to move it by reaching over the draw-bar.

Instructions 1, 2, and 3½ asked by the appellants were fairly embodied in those given by the court. Instructions 4 & 5 asked by appellants were properly refused because of the amendment to the petition.

The closing argument by Mr. Howell, while not to be commended, does not demand a reversal.

183 We have given the evidence in the record careful consideration and reach the conclusion that it is sufficient to sustain the finding of negligence on the part of the appellants and the finding that the plaintiff was not negligent. The judgment is therefore affirmed.

Affirmed.

LADD, C. J., and BISHOP, J., dissent on the grounds appearing in dissenting opinion in McGuire v. Ry., 131 Iowa, 384.

184 Supreme Court of Iowa.

STATE OF IOWA, ss:

Be it remembered, That on the 9th day of June, 1908, the following proceedings, among others, were had in the Supreme Court of Iowa, to wit,

No. 25656.

CHARLES L. MCGUIRE

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD Co. et al., Appellants.

Appeal from Appanoose District Court.

In this cause the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at \$56.25 and that execution issue therefor.

1841/2

In the Supreme Court of Iowa.

CHARLES L. MCGUIRE, Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellants.

Appeal from Appanoose County.

Petition for Writ of Error.

To the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of the State of Iowa:

Now comes the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, your Petitioners, by Frank S. Payne, H. H. Trimble and Palmer Trimble, their attorneys, and complain and say that Charles L. McGuire, in the year 1901, commenced a suit in the District Court of Appanoose County, Iowa, claiming Two Thousand Dollars (\$2,000) damages for personal injury alleged to have been sustained by him by reason of the negligence of the said Chicago, Burlington & Quincy Railroad Company while in its service as a brakeman.

Afterwards, to wit, on the 13th day of February, 1902, your Petitioner, the Chicago, Burlington & Quincy Railroad Company, filed an answer to the above named claim. In the third count of said Answer it pleaded an accord and satisfaction of said claim, alleging that your Petitioner, Chicago, Burlington & Quincy Railroad Company had established a Relief Department in 1889 for the benefit of its employees in case of sickness and injuries, said Department having been organized to indemnify said employees for loss because of sickness and injuries, and that said Charles L. McGuire, Appellee, was, at the time of his alleged injuries a member of the said Relief Department; also averring that said McGuire, 185 when he became a member of said Relief Department, entered into a contract with your said Petitioner, which contract, among other things, stipulated that if said McGuire received injuries while a member of said Relief Department, and, after having received such injuries, voluntarily accepted benefits from said Relief Department because of such injuries, then such act of accepting benefits should operate as an accord and satisfaction of all claims for such injuries, including the claims sued on in the case hereinbefore referred to.

Said answer further showed that said McGuire did voluntarily accept benefits from your Petitioner to said Relief Department as an indemnity for such injuries received, to all of which he was

entitled by the terms of said contract; which benefits amounted in the aggregate to Eight Hundred and Twenty Dollars (\$820.00). Said Answer set out in detail all the facts of said membership and said contract and the provisions of said contract and the receipt of said benefits and pleaded same as an accord and satisfaction of the claim sued on and as full release of your Petitioner from any liability to said McGuire because of such injury.

For a more detailed statement of all the facts pleaded in the third count of said Answer, reference is hereby made to the records of said cause commenced as aforesaid by said McGuire, now on file in the office of the Clerk of the Supreme Court of Iowa, at Des Moines, Iowa.

Your Petitioners further say that afterwards, to wit, on the 25th day of April, 1903, the said Chicago, Burlington & Quincy Railroad Company, filed in said District Court an Amendment to said Answer in which said Amended Answer it set forth that it had a right to make the contract with the said Charles L. McGuire, Plaintiff in the foregoing action, such as was pleaded in said Original Answer, and also said that Charles L. McGuire entered into the contract pleaded by your Petitioner in said Answer, and accepted the same,

and accepted the benefits named in said contract and pleaded
186 in said Answer, and averred that it was not barred from making said contract by reason of any legislation enacted by the

State of Iowa, especially Section 2071 of the Code of Iowa, as amended March 8th, 1898, by the Twenty seventh General Assembly, which said section is printed in full in the Supplement to the Code of Iowa, published in 1902, being Section 2071, found on Page 215 of said Code Supplement, and also in said Amended Answer averred further that said Section was and is void as being in contravention of the Constitution of the United States, especially Section 1, Article 14 of Amendments to said Constitution—that it was an unlawful attempt to deny the right of private contract; that said section as amended, being Section 2071, Code Supplement, was an unlawful attempt to take from your Petitioner and the twenty thousand of its employees, members of said relief department, the right and liberty to make private contracts, and because said section, as amended, was an attempt to deprive your Petitioners of the equal protection of the law in direct violation of Section 1 of said Fourteenth Amendment to the Constitution of the United States.

Your Petitioners say that the Chicago, Burlington & Quincy Railway Company, afterwards, to wit, on or about March 1st, 1902, leased and commenced operating the Railroad property of the other Defendant, Chicago, Burlington & Quincy Railroad Company, and in order to obviate any inconvenience to Plaintiff in collecting his judgment in the event that he obtained a judgment against your Petitioner, Chicago, Burlington & Quincy Railroad Company, it was, on the 31st day of March, 1902, agreed that if said McGuire obtained a judgment in the said case against your Petitioner, the Chicago, Burlington & Quincy Railroad Company, that said judgment should also go against the Chicago, Burlington & Quincy Rail-

way Company, and in order to carry out such agreement the said Railway Company afterwards entered its appearance in said case.

187 Your Petitioners further say that on the 8th day of May, 1903, the said Charles L. McGuire, Appellee, filed a demurrer to the third count of the Answer hereinbefore spoken of, claiming in said demurrer that the said Statute above referred to, Section 2071, was a valid Statute, and that the facts pleaded as an accord and satisfaction in said suit did not constitute a valid defense.

Your Petitioners say, afterwards, to wit, on the 9th day of October, 1903, said demurrer came up for hearing in the District Court aforesaid and was submitted to the said Court, and was on said 9th day of October, 1906, at a regular term of said Court then pending, sustained as to all allegations made and incorporated in said Answer relating to the Relief Department contract pleaded in said Answer.

Your Petitioners say, that they, through their legal counsel then and there excepted to the ruling of said Court upon said demurrer, and then and there announced in open Court that they would stand upon their Answer covered by said demurrer.

Petitioners say that they then and there announced to said Court that they would not plead over as to that portion of their Answer covered by said Demurrer.

Your Petitioners further say that the said case was then tried in said Court upon other issues in the cause and verdict found against your Petitioners by the Jury for Two Thousand Dollars (\$2,000), and judgment rendered thereon, from which Judgment Defendants appealed to the Supreme Court of Iowa, said Court being the highest Court of Law and Equity in the State of Iowa.

Your Petitioners further say that pending the appeal, your Petitioners filed an Abstract in said Supreme Court, containing, among other things, all the matters herein averred, and also claiming before the Court, that the trial Court erred in sustaining said demurrer to that part of the Answer of Petitioners which pleaded an accord and satisfaction and asked the said Supreme Court to pass upon said alleged error.

Your Petitioners further say that on the 9th day of June, 188 1908, in the City of Des Moines, Iowa, while said Supreme Court was in session, transacting business as a Court, that said Court rendered a decision in said cause, in which it affirmed the judgment appealed from, among other things, holding that the demurrer hereinbefore set forth and described was properly sustained by the trial court, and that there was no error in that or in any other respect in the ruling of the trial court. And your Petitioners say that the said Supreme Court of Iowa affirmed the ruling of the Court below upon all points presented by the record on said appeal, including the action of the Court in sustaining said demurrer, and that said decision was final as to said Court and the Court from which said appeal was taken, all of which matters appear in the record and proceedings of said suit in said Supreme Court.

Your Petitioners aver and claim that the action of said Court in

affirming the judgment of the Court below, and especially in affirming the ruling of the lower Court in which it sustained the demurrer of Plaintiff to answer of your Petitioners' covered by said demurrer, was manifest error.

Wherefore your Petitioners Pray for an allowance of a Writ of Error to take said proceeding to the Supreme Court of the United States for the determination of said Court, and pray for such other process as may cause the action of said State Supreme Court in affirming the judgment of the Court below to be corrected by the Supreme Court of the United States.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY AND
CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,

Appellants & Petitioners,

By H. H. TRIMBLE,
F. S. PAYNE &
PALMER TRIMBLE,

Their Attorneys.

Upon consideration of the above petition it is on this 3rd day of August, A. D. 1908, ordered that a writ of error be, and hereby is allowed, as therein prayed to have reviewed in the Supreme Court of the United States the judgment heretofore entered in said
189 cause upon the petitioners giving bond according to law in the sum of Four Thousand Dollars (\$4,000), which shall operate as a supersedeas bond.

SCOTT M. LADD,

*Chief Justice of the Supreme Court
of the State of Iowa.*

190

Supreme Court of the State of Iowa.

CHARLES L. MCGUIRE, Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and CHICAGO,
BURLINGTON & QUINCY RAILWAY COMPANY, Appellants.

Bond.

Know all men by these presents that we, the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company and A. E. Johnstone and A. C. Maxwell of the City of Keokuk, Iowa, are held and firmly bound unto the above named Charles L. McGuire in the sum of Four Thousand Dollars (\$4,000.), to be paid to the said Charles L. McGuire, his executors or administrators; for the payment of which, well and truly to be made, we the said Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, for themselves, their successors and assigns, and the said A. E. Johnstone and A. C. Maxwell for themselves, their heirs and personal repre-

sentatives, bind ourselves personally and joint and severally, firmly by these presents.

Sealed with our seals and dated the 1st day of August, in the year one thousand nine hundred and eight.

Whereas, the above named Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company have prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action against each of them by the Supreme Court of Iowa, on the 9th day of June, A. D. 1908.

Now, therefore, the condition of this obligation is such that if the above named Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, shall prosecute their said Writ of Error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

Dated August 1st, A. D. 1908.

191 CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, *Principal*,
By D. MILLER, *1st Vice President*.

Attest:

[SEAL.] H. W. WEISS,
Ass't Secretary.

CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY, *Principal*,
By D. MILLER, *1st Vice President*.

Attest:

[SEAL.] H. W. WEISS,
Ass't Secretary.

A. E. JOHNSTONE, *Surety*. [SEAL.]
A. C. MAXWELL, *Surety*. [SEAL.]

The above bond is by me approved, and it is ordered that said Bond operate as a supersedeas.

August 3rd, 1908.

SCOTT M. LADD,
*Chief Justice of the Supreme Court
of the State of Iowa.*

192 STATE OF IOWA,
County of Lee, ss:

A. E. Johnstone, one of the sureties named in the foregoing Bond, being first duly sworn deposes and says as follows:

I am the same person whose name is subscribed to the foregoing Bond as A. E. Johnstone, and I state that I am a householder and resident of the County and State aforesaid and that I am worth more than the sum of Four Thousand Dollars (\$4,000), over and above all my just debts and liabilities, in property not by law exempt from execution, in this State.

A. E. JOHNSTONE. [SEAL.]

Subscribed in my presence and sworn to before me by A. E. Johnstone, on this the 1st day of August, A. D. 1908.

Witness my hand and seal date last above mentioned.

[SEAL.]

A. J. MATHIAS,

Notary Public in and for Lee County, Iowa.

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In the Supreme Court of Iowa.

CHARLES L. MCGUIRE, Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellants.

Now comes the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, Appellants in above entitled cause, and, in connection with their Petition for a Writ of Error, respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of Iowa in the above entitled cause and matter, there is manifest error in this, to-wit:

I.

The Court erred in holding that the action of the District Court of Appanoose County, Iowa, in sustaining the demurrer of Appellee, Charles L. McGuire, to the third count of the Answer of Appellant, the Chicago, Burlington & Quincy Railroad Company, being that part of Appellant's Answer which pleaded an accord and satisfaction of the claim sued on, was not erroneous.

II.

The Court erred in affirming the ruling of said District Court in its holding that the plea of accord and satisfaction pleaded by Appellant, the Chicago, Burlington & Quincy Railroad Company, was, insufficient in law, to constitute a defense.

III.

The Court erred in holding that the Relief Contract pleaded by Appellant, the Chicago, Burlington & Quincy Railroad Company, was void under Section 2071, Code of Iowa, as amended by the Twenty-seventh General Assembly of Iowa, Chapter 49.

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IV.

The Court erred in holding that Section 2071 of the Code of Iowa, as amended by the Twenty-seventh General Assembly, Chapter 49, found in "Supplement Code of Iowa 1902" was a valid statute.

V.

The Court erred in holding that the Relief Department Contract pleaded as a release of the liability of Appellant, the Chicago, Burlington & Quincy Railroad Company, was rendered void by the provisions of said Section 2071.

VI.

The Court erred in holding that said Statute was not contrary to the Constitution of the United States and did come within the inhibitions of said Constitution and especially of Section 1, Article 14 of the Amendments to said Constitution.

VII.

The court erred in affirming the judgment and ruling of the District Court of Appanoose County in sustaining the demurrer of the said Charles L. McGuire to the third count of Answer of Appellant in which was drawn in question the validity of said Section 2071, as being repugnant to the Constitution of the United States, and especially as being repugnant to Section 1 of the 14th Amendment, of said Constitution.

We therefore pray that the said judgment of the Supreme Court may be reversed and that we may have such other Relief as may be proper and just.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY AND
CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,

Appellants,

By H. H. TRIMBLE,
F. S. PAYNE &
PALMER TRIMBLE,

Their Attorneys.

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The Above assignment of Errors was presented to me with the Petition for Writ of Error. The Clerk of the Supreme Court of Iowa is directed to file the same as one of the papers in this proceeding to procure Writ of Error.

August 3rd A. D. 1908.

SCOTT M. LADD,

Chief Justice of the Supreme Court of Iowa.

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to The Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, between Charles L. McGuire Appellee and Chicago Burlington & Quincy Railroad Company and Chicago Burlington and Quincy Railway Company Appellants wherein was drawn in question a right or privilege set up and claimed under the constitution of the United States and the decision of said court was against the rights and privileges so set up and claimed, and wherein was drawn in question the validity of a statute of the State of Iowa on the ground that it was repugnant to the Constitution of the United States, and the decision was in favor of the validity of such statute. A manifest error hath

happened, to the great damage of the said Chicago Burlington & Quincy Railroad Company and Chicago Burlington & Quincy Railway Company as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days after date of signing the citation herein in the said Supreme Court, to be then and there held, that the record and proceeding- aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error. What of right and according to the laws and custom of the United States should be done.

197 Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3rd day of August, A. D. 1908.

[SEAL.]

EDWARD R. MASON,
*Clerk United States Circuit Court,
Southern District of Iowa.*

Allowed:

SCOTT M. LADD, *
Chief Justice of the Supreme Court of Iowa.

198 In the Supreme Court of the State of Iowa.

CHARLES L. MCGUIRE, Appellee,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and CHICAGO,
BURLINGTON & QUINCY RAILWAY COMPANY, Appellants.

Now comes the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, Appellants, in the above named cause, on this the 3rd day of August, A. D. 1908, and file and present to the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of the State of Iowa, their petition praying for an allowance of a Writ of Error intended to be urged by them, and praying further that a duly authenticated Transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises that may be just and proper, and, upon consideration of said Petition, Hon. Scott M. Ladd, Chief Justice as aforesaid, desiring to give the Petitioners an opportunity to test, in the Supreme Court of the United States, the questions therein presented, as ordered by the said Hon. Scott M. Ladd, as such Chief Justice of the Supreme Court of Iowa, that a Writ be allowed as prayed, provided, however, that said Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, Appellants, give bond according to law in the sum of Four Thousand Dollars (\$4,000.00), which said bond shall operate as a supersedeas bond.

In testimony whereof, Witness my hand this 3rd day of August,
A. D. 1908.

SCOTT M. LADD,
*Chief Justice of the Supreme Court
of the State of Iowa.*

199 In the Supreme Court of Iowa.

CHARLES L. MCGUIRE, Appellee,
vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and CHICAGO,
BURLINGTON & QUINCY RAILWAY COMPANY, Appellants.

UNITED STATES OF AMERICA, ss:

To Charles L. McGuire:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the Supreme Court of Iowa, wherein the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of the State of Iowa, this 3rd day of August, in the year of our Lord one thousand nine hundred and eight.

SCOTT M. LADD,
*Chief Justice of the Supreme Court
of the State of Iowa.*

We hereby acknowledge service of the foregoing citation, August 5th, 1908.

HOWELL & ELGIN,
Attorneys for Charles L. McGuire, Defendant in Error.

[Endorsed:] Original. Charles L. McGuire, Appellee, vs. C. B. & Q. R. R. Co. & C. B. & Q. Ry. Co., Appellants. Citation. Filed Aug. 3, 1908. H. L. Bousquet, Clerk Supreme Court. H. H. Trimble, F. S. Payne, & Palmer Trimble, Att'ys for App'l'ts.

200 STATE OF IOWA, ss:

I, H. L. Bousquet, hereby certify that I am the Clerk of the Supreme Court of Iowa, and the legal custodian of the records and files pertaining to said office, that the above and foregoing pages contain true full and complete transcripts of all the record and judgment entries and copies of opinions, in the case of Charles L. McGuire vs. the Chicago, Burlington & Quincy Railroad Co. and Chicago, Burlington & Quincy Railway Co. also copies of the petition

for a writ of error, Bond, assignment of errors, order for transcript from the Supreme Court of the United States, order for transcript from the Supreme Court of the State of Iowa, and the original citation issued in said case, as full true and complete as the same now appear and remain of record and on file in this office together with printed copies of all abstracts and amended abstracts filed in the two appeals in said case.

In Testimony whereof I have hereunto set my hand and official seal this 11th day of August 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET,
Clerk of the Supreme Court of Iowa.

My fees amounting to \$17.20 paid by Ch. Burl. & Qey. Railroad Co. this Aug. 14th, 1908.

H. L. BOUSQUET, *Clerk.*

Endorsed on cover: File No. 21,322. Iowa Supreme Court. Term No. 247. Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, plaintiffs in error, vs. Charles L. McGuire. Filed August 27th, 1908. File No 21,322.

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JAMES H. MCKENNEY,

CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 62

CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY AND CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,

Plaintiffs in Error,

vs.

CHARLES L. MCGUIRE,

Defendant in Error.

Error to the Supreme Court of the State of Iowa.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

JOHN J. HERRICK,

Attorney for Plaintiffs in Error.

CHESTER M. DAWES,

Of Counsel.

GUTHORP - WARREN PRINTING CO., CHICAGO

(21,322.)

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 62

CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY AND CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,

Plaintiffs in Error,

vs.

CHARLES L. MCGUIRE,

Defendant in Error.

Error to the Supreme Court of the State of Iowa.

STATEMENT.

This is a writ of error to review a judgment of the Supreme Court of Iowa, affirming a judgment of the State District Court for \$2,000 for personal injuries.

The case involves the question of the constitutionality of a statute of Iowa passed in 1898.

This statute (quoted in full, *infra*, pp. 14-15), in effect prohibited a railroad company from setting up in bar of a recovery by an employe for personal injuries, the accord and satisfaction which the Supreme Court of Iowa had held in two previous de-

cisions (*Donald v. Ry. Co.*, 93 Iowa, 284, and *Maine v. Ry. Co.*, 109 Iowa, 260) resulted by contract of the parties from the acceptance by the employe of benefits from the defendant's Relief Department, on the terms provided in his contract of membership—that in case of an injury to an employe who was a member of the department, for which he claimed a right of recovery against the company, he should elect either to accept the benefits in settlement or to sue the company, but should not be entitled to the double compensation of both the benefits and a recovery against the company, for the same injury.

The contention of plaintiffs in error is that this statute is in violation of the Fourteenth Amendment and therefore void, both on the ground that it is an unauthorized interference with the freedom of contract guaranteed by that amendment, and also on the ground that it is a denial of the equal protection of the laws.

As appears from the many adjudicated cases cited *infra*, similar Relief Departments have been established and maintained for many years by other railroad companies, including the Pennsylvania Company, the Baltimore & Ohio Company, the Atlantic Coast Line, the Philadelphia & Reading Company and the "Plant System," and like contracts of settlement have been sustained and enforced in a large number of decisions, both of the Federal courts, and of the courts of last resort of different states, including Ohio, Pennsylvania, Indiana, Illinois, New Jersey, Nebraska and Maryland.

While the Supreme Court of Iowa, in the case before the court, held the particular statute—passed, as we have seen, after and because of the two pre-

vious decisions by the Supreme Court of the State,—valid, the decision was by a divided court, and in a number of cases cited *infra*, similar statutes of other states have been held void on the ground that they were in violation of the Fourteenth Amendment.

The case, therefore, involves in its effect not only the question as to the validity of the particular statute of Iowa, but also the far-reaching question of the validity of other similar statutes, which have been, or may be, passed in other states.

The importance and far-reaching character of the question is our apology for the length of our Brief and the Argument in support of it.

The judgment of the State District Court affirmed by the State Supreme Court was a judgment in favor of the defendant in error and against the plaintiffs in error, for \$2,000 for personal injuries (Rec., 53), the plaintiff in error, Chicago, Burlington & Quincy *Railroad* Company, being the company operating the railroad at the time of the injury, and the plaintiff in error, Chicago, Burlington & Quincy *Railway* Company, being joined because of its *ownership* of the road.

The ground of recovery alleged in the petition of the defendant in error was that on the 30th of November, 1900, he was in the employ of the defendant, the Chicago, Burlington & Quincy *Railroad* Company, as a brakeman, and that on that day, while engaged as a brakeman on a freight train, he was injured while in the performance of his duties by its negligence. (Rec., 1-2.)

The Railroad Company filed an answer, in the first count of which it denied every allegation of the petition, and in the second count, alleged that the

plaintiff was guilty of contributory negligence. (Rec., 3.)

In the third count it set up at length the facts as to the organization by it in 1889 of a Relief Department, the workings of the Department, the regulations as to membership and its conditions, and the contributions by the defendant to its support and maintenance; that under the organization employees who elected to become members were entitled to its benefits because of disability—whether caused by accident, or the result of sickness without any fault of the Company, and whether happening while on or off duty; that the employees on becoming members signed an application for membership by which they agreed to be bound by the regulations of the Department; that one of these regulations provided that in case of disability a member should have sixty days in which to present his claim for benefits; that another regulation provided that, in case the disability was the result of an injury while engaged in the service of defendant, he should have his election either to accept the benefits or to sue the company, and that “the acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company”; that before his injury, plaintiff became a member of the defendant’s Relief Department and had paid 85 cents as his dues; that after the injury he elected to accept the benefits on the terms of the regulations, and was paid the sum of \$822 in benefits and medical and hospital attendance, and that this was an accord and satisfaction. (Rec., 3-10.)

By an amendment to this third count of the answer, it was further alleged that the defendant had a right to make the contract which it pleaded as an

accord and satisfaction; that the plaintiff accepted the contract and enjoyed the benefits of it, and that the defendant was not barred of its right to plead the contract by Section 2071 of the Code of Iowa, as amended March 8, 1898 (the statute in question), which it was averred attempted to invalidate contracts of the character pleaded by the defendant; that that section of the Code as amended was void as being contrary to Article 14 of the Constitution of the United States, for the reason that it attempted to deprive the defendant of the right to make the contract pleaded, without due process of law, and also because it deprived ~~him~~ of the equal protection of the laws. (Rec., 27.) *it*

The facts set out in this third count of the answer will be stated more fully hereafter.

The plaintiff filed a demurrer to this third count of the answer, setting up as one of the grounds that the contract of release pleaded was rendered null and void by Section 2071 of the Code of Iowa as amended, referred to in the count. (Rec., 29-31.)

This demurrer was overruled and thereupon judgment was rendered on the demurrer in favor of the defendant, and an appeal was taken from this judgment to the Supreme Court of the State. (Rec., 58.)

On this appeal the question whether the particular statute was in violation of the Fourteenth Amendment on the grounds stated, was presented to and fully considered by the Supreme Court of the State, and that court, in a very full opinion (two judges dissenting), held that the statute was not in violation of the Fourteenth Amendment on either of the grounds asserted, and that therefore the trial court erred in overruling the demurrer, and re-

manded the case for further proceedings in conformity with the opinion.

For the opinion of the State Supreme Court, see Rec., 57-86; 131 Iowa, 342-384.

A dissenting opinion was filed by Ladd, J., in which Bishop, J., concurred. See Rec., 86-96; 131 Iowa, 384-400.

The case having been remanded to the trial court, that court, in pursuance of the opinion, sustained the demurrer to the special count (Rec., 31) and the case thereupon proceeded to trial on the issues made on the allegations of the petition. This trial resulted in a verdict for the amount claimed—\$2,000. (Rec., 53.)

A motion for a new trial was made in which the defendant assigned as one of the grounds for the motion, in different forms, that the court erred in refusing to hold that the statute in question was in violation of the Fourteenth Amendment. This motion was overruled and judgment entered on the verdict. (Rec., 53-55.)

An appeal was thereupon taken by plaintiffs in error to the State Supreme Court, and on this appeal the action of the trial court in overruling the demurrer was assigned for error. The Supreme Court held that the demurrer was properly sustained, referring to its opinion on the former appeal in *McGuire v. Railway*, 131 Ia., 340. (Rec., 98.)

A reversal was also asked on other grounds, and the court in its opinion, after considering these further grounds urged for reversal, held that they were not sustainable and that the judgment should be affirmed. (Rec., 98-100.)

Ladd, J., and Bishop, J., also, dissented from this

opinion on the grounds stated in the dissenting opinion on the former appeal. (Rec., 100.)

This is a writ of error brought to review the judgment of affirmance of the State Supreme Court.

The petition for writ of error sets out the claims made as to the unconstitutionality of the statute of Iowa on the two grounds on which it is claimed that it was in violation of the Fourteenth Amendment. (Rec., 101-104.)

The assignment of errors by the defendant also states in different forms as ground for reversal, that the statute in question was in violation of the Fourteenth Amendment, and that for that reason the State Supreme Court erred in sustaining the demurrer to the special count. (Rec., 106-107.)

We will now state the particular facts set out in the defendant's third count (Rec., 3-10)—as constituting an accord and satisfaction,—and admitted by the demurrer. (Rec., 29-31.)

The organization and purpose of the defendant's Relief Department.

Prior to the year 1889, the defendant was, and has been ever since, a corporation owning and operating a railroad through portions of the State of Iowa and other states. In the operation of its railroad, it had in its employ in the various departments of its service, a large force of men. The business of operating the railroad, including its various departments, was more or less hazardous, and necessarily exposed its employees to risks of personal injury and sickness. Because of the high rate charged by the ordinary accident insurance companies of the country and the heavy premiums exacted by such companies from all who

are engaged in the hazardous business of railroad-ing, very few of the employes of the defendant could afford to pay, or would pay, sufficient sums of money to secure from such insurance companies benefits or indemnity for their own protection and the protection of their families. Most of these employes were and are desirous of securing such benefits and protection in case of injury or sickness, when the same can be had at reasonable rates. In the year 1889, the defendant, being desirous of aiding its employes in securing such benefits and protection in case of injury and sickness, and thus promoting their welfare and cultivating their good will, and improving the service, established, and has since maintained, as part of its service, a mutual benefit department called the "Relief Department." The object of this Relief Department was the creation and maintenance of a fund to be known as the "relief fund," out of which to pay definite amounts to the employes contributing thereto, when, under the regulations of the Department, they were entitled to payment by reason of disability from sickness or accident, or, in the event of death from any cause, to furnish funds for the burial and the relief of their families. (Rec., 3-4.)

At the time the defendant organized its Relief Department, there were other railroad companies associated with it, and known together with it as the Burlington System, which had also established Relief Departments. In pursuance of a regulation of its Relief Department, the defendant had associated itself with the other companies with respect to the management and conduct of their Relief Departments, and was thereby enabled to greatly economize in expenditures. (Rec., 4-5.)

The manner of maintaining the Relief Department and the Relief Fund.

The regulations provided that a fund should be raised by the Relief Department, for the payment of definite amounts of benefits to employes becoming members, who were to be known as members of the Relief Fund. (Rec., 5.)

The regulations further provided for the payment of dues by the members to be applied as contributions to the Relief Fund; that the defendant should, and did, guarantee to the members of the Relief Fund the fulfillment of all obligations of the Department; that it should hold as a trust fund and take charge of, and be responsible for the safe keeping of, all money belonging to the Relief Fund, and should pay interest at the rate of four per cent. on all monthly balances in its hands, and should supply, without expense to the Relief Fund, the necessary facilities for conducting the business of the Department, and, from its own funds, should pay all operating expenses, and supply all deficits. They also provided that there should be furnished by the defendant for the use of the Department, a superintendent, an assistant superintendent and a medical director. (Rec., 5-6.)

They further provided that when there was a deficit in the Relief Fund, that is to say—when there was not enough to meet all demands for benefits when due—the defendant company should supply from its own funds sufficient money to cover the deficit, and also that the defendant should guarantee the payment of all such benefits. (Rec., 6.)

Membership in the Relief Department Voluntary.

The regulations further provided that no person

except employes of the defendant could become members, that membership was voluntary, and that any member might withdraw from membership at any time. The method of becoming a member was by application in writing. The regulations required that each applicant for membership should be fully advised of all the facts pertaining to the Relief Department and required that a printed book be placed in the hands of the applicant, containing a plain statement of the purpose of the Department and copies of the regulations, and required him to carefully read the book before he became a member. (Rec., 6-7.)

The regulation of the Relief Department providing for an election by an injured member, either to accept benefits or sue the company.

This regulation (Rec., 24) provided as follows:

"In case of injury to a member he may elect to accept the benefits in pursuance of the regulations, or to prosecute such claims as he may have at law against the Company or any Company associated therewith in the administration of their Relief Departments. The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the Company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury."

The regulation also provided that a recovery against, or a settlement by way of compromise with, the defendant company, should preclude any claim for *benefits* from the Relief Department.

The payments made by the Relief Department for benefits from the organization in 1889 to December 31, 1900.

The total amount paid from the Relief Fund for

benefits during that period was \$2,671,500. Of this amount there was paid *for sickness* \$1,294,790 and for benefits *for injuries* and death resulting *from injuries* \$1,376,720. (Rec., 8.)

The contribution of the defendant to the Relief Department and its fund.

Pursuant to its obligations as provided in the regulations, the defendant has maintained and kept up the Relief Department since its organization in 1889, has paid from its own moneys all expenses of operating the Relief Department, including office rent, official salaries, clerk hire, stationery, salaries of the medical director, and numerous medical examiners, and a large number of other expenses. The total amount paid by the defendant for operating expenses to December 1, 1900, was \$621,572.44. In addition to this amount, it has paid other expenses connected with the Relief Department and had provided offices and other incidentals, amounting to \$50,000 per annum, being a total of \$550,000 during this period. The defendant has also supplied deficits in the Relief Fund to the amount of \$42,532 which was necessary to pay the benefits and which could not be recovered back. The total amount thus contributed by the defendant was \$1,214,104. (Rec., 7.)

It will be seen, on comparison of these amounts with the total amounts paid for benefits by the Relief Department during this period, stated *supra*, that the amount thus contributed by the defendant to the support and maintenance of the Relief Department and its fund—\$1,214,104—nearly equaled the total amount of benefits paid for *sickness*—\$1,294,790—and also nearly equaled the total amount of

benefits paid for injuries and death resulting from injuries—\$1,376,720.

The facts as to the voluntary action of the plaintiff in becoming a member, the dues paid by him, his knowledge of the regulations and his voluntary acceptance of the benefits on the terms provided.

The answer averred that the plaintiff made voluntary application in writing on the 19th of November, 1900, to be admitted as a member. (Rec., 8.) A copy of this application was made part of the answer. (Rec., 26.) This application was signed by the plaintiff in error and contained the following: "I agree to be bound by the regulations of the Relief Department of said Company." A book containing the regulations of the Relief Department was also delivered to him. His application for membership was accepted on the 20th of November, 1900, and he was duly admitted to membership on the same day. Up to the date of the accident on November 30, 1900, he had paid all his contributions. These contributions amounted in the aggregate to 85 cents. (Rec., 8.)

The facts as to the payment and receipt of the benefits by McGuire.

The regulations provided that any claim for disability for benefits must be made within sixty days from the time when the benefits accrue. (Rec., 24.) McGuire suffered his injury on the 30th of November, 1900. He was paid in the aggregate benefits to the amount of \$492 (Rec., 9) in eleven checks, paid monthly, all of which were payable to his order and each of which con-

tained the statement that it was "*paid and accepted under the regulations of the Relief Department.*" The first of these checks was dated January 8, 1901, and the first payment of benefits was therefore made and accepted by him five weeks after his injury. (Rec., 26.) There was also paid for his benefit out of the Relief Fund \$330 for surgical and medical attendance and nursing (Rec., 9), making a total of \$822.

The two decisions of the Supreme Court of Iowa, rendered prior to the passage of the act, the validity of which is in question, that the contracts of settlement prohibited by the act, were contracts of accord and satisfaction based on mutual considerations, and binding as such.

The character, object and validity of the Relief Department, including the provision in the application for membership and the regulation referred to and agreed to as one of the conditions of the application, that in case of injury to a member, he should have an election to accept benefits, pursuant to the regulations, or to prosecute any claim he might have at law against the railroad company, but that the voluntary acceptance of benefits for injury should operate as a release of the right to damages—an accord and satisfaction—were exhaustively examined, and in every respect sustained, by the Supreme Court of Iowa in the two cases of *Donald v. C., B. & Q. Ry. Co.*, 93 Ia., 284, and *Maine v. C., B. & Q. Ry. Co.*, 109 Ia., 260, the first decided in 1895, and the second in 1897. *See infra pp 41-44.*

As appears from the reports of these cases, the regulations of the Relief Department in force at the time the defendant in error became a member and

his alleged cause of action arose, were in every material respect the same as those considered by the court in the above cases.

The statute, the validity of which is in question—Code, Section 2071 as amended in 1898—prohibiting railroad companies from setting up the contracts of settlement by the acceptance of the benefits, in bar of a recovery by employes for injuries.

The original act—Section 2071 of the Code, passed in 1898—was in effect an act codifying the law of the State as to the liability of railroad companies for injuries incurred by negligent or wilful acts, in the operation of their railroads, and as construed by the Supreme Court of the State, it also had the effect of abolishing the fellow-servant rule in Iowa.

This original act—Code, Section 2071—passed in 1873, was as follows:

“Every corporation operating a railway shall be liable for all damages sustained by any person, including the employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs whether of commission or omission of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.”

The act in question, passed in 1898, was in the form of an amendment to the above section of the Code. The provision which it added was as follows:

“Nor shall any contract of insurance, relief, benefit or indemnity in case of injury or death, entered into prior to the injury between the person so injured and such corporation or any other

person or association, acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to invalidate any settlement for damages between the parties subsequent to the injuries received."

We assert two main propositions:

1. The statute, the validity of which is drawn in question, is void for the reason that it is in violation of the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law.

2. The statute in question is in violation of the provision of the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws.

SPECIFICATION OF ERRORS.

I.

The court erred in holding that the action of the District Court of Appanoose County, Iowa, in sustaining the demurrer of defendant in error, Charles L. McGuire, to the third count of the answer of plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, being that part of appellant's answer which pleaded an accord and satisfaction of the claim sued on, was not erroneous.

II.

The court erred in affirming the ruling of said District Court in its holding that the plea of accord and satisfaction pleaded by plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, was insufficient in law to constitute a defense.

III.

The court erred in holding that the Relief Contract pleaded by plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, was void under Section 2071, Code of Iowa, as amended by the Twenty-seventh General Assembly of Iowa, Chapter 49.

IV.

The court erred in holding that Section 2071 of the Code of Iowa, as amended by the Twenty-seventh General Assembly, Chapter 49, found in "Supplement Code of Iowa, 1902," was a valid statute.

V.

The court erred in holding that the Relief Department Contract pleaded as a release of the liability of plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, was rendered void by the provisions of said Section 2071.

VI.

The court erred in holding that said statute was not contrary to the Constitution of the United States and did not come within the inhibitions of said Constitution and especially of Section 1, Article 14 of the Amendments to said Constitution.

VII.

The court erred in affirming the judgment and ruling of the District Court of Appanoose County in sustaining the demurrer of the said Charles L. McGuire to the third count of answer of plaintiff in error, in which was drawn in question the validity of said Section 2071, as being repugnant to the Constitution of the United States, and especially as being repugnant to Section 1 of the 14th Amendment of said Constitution.

BRIEF.

I.

THE STATUTE, THE VALIDITY OF WHICH IS DRAWN IN QUESTION, IS VOID FOR THE REASON THAT IT IS IN VIOLATION OF THE PROVISION OF THE FOURTEENTH AMENDMENT THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

There are certain fundamental propositions, settled by the decisions of this court, to which we call attention in the outset.

(1) *The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to declare unconstitutional and void any act of the legislature which impairs or destroys any right secured by the constitution.*

Smyth v. Ames, 169 U. S., 466.

Cotting v. Stock Yards Co., 183 U. S., 79, 107.

(2) *Corporations are persons within the meaning of the Fourteenth Amendment, as was recognized in the opinion of the court below (Rec., 63), and for that reason cannot be deprived by an act of the legislature of any right guaranteed by it, any more than natural persons.*

Gulf, Col. & S. T. R. R. Co. v. Ellis, 165 U. S., at 154, and cases cited.

(3) *Freedom of contract is one of the inalienable rights which is protected by the provision of the Fourteenth Amendment, that no state shall de-*

prive any person of life, liberty or property without due process of law, and for that reason any statute of the state which prohibits its exercise should be declared void by the court unless the act can be sustained as a valid exercise of the police power.

Under the provision of the Fourteenth Amendment that "no person shall be deprived of life, liberty or property without due process of law," freedom to enter into contracts is both a liberty and a property right, secured alike to all persons, natural and artificial, and not to be encroached upon by the state under guise of its police power.

Allgeyer v. Louisiana, 165 U. S., 578.

Lochner v. New York, 198 U. S., 45.

Connelly v. Union Sewer Pipe Co., 184 U. S., 540.

Adair v. United States, 208 U. S., 161.

McLean v. Arkansas, 211 U. S., 539.

1. Under the express decisions of the Supreme Court of Iowa rendered prior to the passage of the act in question, and a long line of decisions of other courts, the contract of accord and satisfaction, resulting from the acceptance of benefits under the contract of membership, was a contract based on mutual considerations and valid and enforceable as lawfully made by the parties in the exercise of their power to contract.

Donald v. C. B. Q. Ry. Co., 93 Iowa, 284.

Maine v. C. B. Q. Ry. Co., 109 Iowa, 260.

These decisions of the Supreme Court of Iowa, which, as we have seen, settled the law in Iowa on the subject, are in accordance with a long line of decisions in other jurisdictions, in which the same

question, as to the same or similar Relief Department contracts, was raised and the contract was sustained.

(See pp. 26-28, *infra*, where these cases are cited.)

2. It is indisputable that the purpose of the act in question was to prohibit the exercise in the future by the corporations referred to in the act, and their employees, of the power to make contracts of settlement like the contract in question (which the previous decisions of the Supreme Court of Iowa had held they had), and for that reason—as was also held by the court below—the act, if sustained at all, must be sustained as an authorized exercise of the police power.

It was expressly held by the Supreme Court of Iowa, in its opinion in the case before the court (Rec., 59, 65-66, 68), that the purpose of the act in question, passed subsequent to these decisions, was to prohibit the making of such contracts in the future.

3. To establish the validity of a statute which prohibits the exercise of the power to make contracts that would otherwise be lawful, on the only ground on which such a statute can be sustained—that it was an authorized exercise of the police power by the legislature,—it must be shown, first, that the purpose of the statute was one within the police power, and second, that the particular statute was reasonably appropriate to accomplish such purpose.

The police power of the state is limited to such enactments as have some reasonable tendency to promote the public health, safety, morals, or welfare. In order to establish the validity of a law

enacted under the police power, it must appear to the court, 1st, that the end in view is the promotion of some or all of these objects, and, 2nd, that the law is appropriate and reasonably necessary to the end.

Mugler v. Kansas, 123 U. S., 623, 661.

Lawton v. Steele, 152 U. S., 133, 137.

Ry. Co. v. Smith, 173 U. S., 684, 689, 699.

Lochner v. N. Y., 198 U. S., 45.

Adair v. United States, 208 U. S., 161.

4. The statute cannot be sustained as an authorized exercise of the police power.

In determining whether a particular act was an authorized exercise of the police power, it is always necessary to ascertain from an examination of the act itself, (1) whether *the end in view* was one for which the exercise of the police power was authorized, and (2) whether the means employed by the statute were appropriate *to that end*.

See the authorities cited *supra*.

It is, therefore, important in the outset to have clearly in mind as bearing on the question of its constitutionality—whether it was an unauthorized interference with the freedom of contract or a denial of the equal protection of the laws—the precise purpose and effect of this statute, the validity of which is in question.

The act, the validity of which is in question, did not prohibit or otherwise make unlawful the contracts of benefit, or the contracts of release by, the acceptance of benefits under them, but only provided that such contracts, and the acceptance of benefits under them, should not bar a recovery (1) from

the class of corporations referred to, (2) by a particular class of employes, (3) for a particular class of liabilities.

The act is an amendment to Section 2071 of the Iowa Code, and it provides, not that such "contracts of benefit," etc., shall not be made nor that they shall be void, but only that "no such contract," "nor the acceptance of any benefits under" such a contract, shall "constitute any bar or defense to any cause of action *brought under the provisions of this section.*"

It is settled by the decisions of the Supreme Court of Iowa, that the statute—to causes of action "brought under" which, the prohibition of the amendatory act is thus limited—*only authorizes a recovery* in suits brought, (1) against *railway corporations*, (2) by a *limited class of the employes* of such corporations,—those whose ordinary duties are connected with the operation of the railroad,—and (3) for damages for injury or death resulting from negligence *connected with the operation of the railroad*—the movement of trains, etc., over the tracks of the company.

See,

Deppe v. R. R. Co., 36 Iowa, 52.

Malone v. Ry. Co., 65 Iowa, 417.

Akeson v. Ry. Co., 106 Iowa, 54.

Reddington v. Ry. Co., 108 Iowa, 96.

Hughes v. Ry. Co., 128 Iowa, 207.

Dunn v. Ry. Co., 130 Iowa, 580.

And it follows, on the other hand, that in all that class of cases not within the provisions of the particular statute, in which there was a common law liability for negligence—the large class of cases in

which the fellow servant rule did not apply—there could be a recovery at common law.

See as illustrating this:

Baldwin v. St. L. K. & N. Ry. Co., 75 Ia., 297.

McQueeney v. C., M. & St. P. Ry. Co., 120 Ia., 522, at 524.

Beresford v. Am. Coal Co., 124 Ia., 34.

Klauffke v. Bettendorf Axle Co., 125 Ia., 223.

Scott v. Iowa Telephone Co., 126 Ia., 524, at 527.

The act manifestly has no possible relation to the public health or public morals, and the act must therefore be sustained, if sustained at all, as a proper exercise of the police power, either (1) on the ground that it was an act passed to promote the public safety, or (2) on the ground that it was an act passed to promote the public welfare.

I. Under the express decisions of the Supreme Court of Iowa, and the other cases cited, *infra*, the voluntary acceptance of the benefits constituted a settlement of the claim of liability—an accord and satisfaction—in no material respect different from any other settlement. And there is nothing in the nature of such a contract of settlement to justify prohibitive legislation differentiating it from other contracts of settlement between railroad companies and their employees.

1. Under the express decisions of the Supreme Court of Iowa and the other cases cited infra, the contract made by the acceptance of the benefit constitutes a settlement—an accord and satisfaction—

between the parties, for the same reasons and in the same way and to the same extent as any other settlement.

(1) There is the same opportunity on the part of the employe in both cases to accept the amount offered, or to reject it and sue the company, and the same opportunity to consult counsel, before electing to accept, as in any other case of an offer of settlement.

(2) There is the same voluntary election to accept the amount in full settlement, the same payment of the full amount offered in settlement, and the same acceptance of it in full settlement.

(3) There is the same mutuality of contract between the company and the employe, and the settlement is based on a like agreed consideration, accepted in full settlement.

In no respect, material to the question of *the power of the legislature to prohibit such settlements*, and thus prohibit the exercise by the employe and employer *of the power to contract*, does such a settlement differ from any other.

(See discussion, pp. 53-56, Argument, *infra*.)

2. *The grounds relied on to sustain the statute prohibiting the settlements in question in this case, as a proper exercise of the police power, would apply equally to a statute prohibiting ALL settlements of claims of liability by employes.*

(See discussion, pp. 57-59, Argument, *infra*.)

II. The statute cannot be sustained as an exercise of the police power on the ground that the end in view was to promote the public safety, and that it was appropriate and reasonably necessary to that end.

(1) *The act itself shows that its purpose—"the end in view"—was not to promote the public safety, but some other wholly different purpose.*

The only theory on which such a contention can be urged is that it was the purpose of the legislature to discourage negligence on the part of the railroad companies, by prohibiting such contracts releasing liabilities for negligence.

This theory cannot be sustained. Nothing in the language of the act expresses any such purpose.

If such had been the legislative reason for passing the act, it would have applied equally to *all* settlements of liabilities for negligence, and the legislature would have prohibited all such settlements.

(See discussion, pp. 59-60, Argument, *infra*.)

Moreover, the language of the Act shows that the purpose of the legislature was not to prohibit settlements of liabilities *for negligence*, but the settlement, in a particular way, of all liabilities of a railway company for injuries to employees.

(See discussion, p. 60, Argument, *infra*.)

(2) *Even if it is assumed that the "end in view" was to promote the public safety, the prohibition was not appropriate and reasonably necessary for that purpose.*

The Act did not impose any regulations to pro-

mote the public safety or the safety of employees, but merely related to benefit contracts and the release of liability resulting only from acceptance of benefits *after* injury had occurred and in no view could the prohibition of such releases discourage negligence.

(See discussion, pp. 60-63, Argument, *infra*.)

See, also,

Ry. Co. v. Cox, 55 Ohio St., at p. 513.

III. The statute cannot be sustained as an exercise of the police power on the ground that the end in view was to promote the public welfare and that it was appropriate and reasonably necessary to that end.

1. *Neither the rule of the defendant's Relief Department nor the contract of membership, nor the contract of release, which, under the decisions results from the acceptance of the benefits after the cause of action has accrued, limits in any way the company's liability for negligence.*

This was expressly held as to the Relief Department of plaintiff in error in

Donald v. C., B. & Q., 93 Iowa, 284.

Maine v. C., B. & Q., 109 Iowa, 260.

Every court of last resort in the United States, in which the point has been raised that this rule has a tendency to limit the company's liability for its negligence has concurred with the court's holding in the *Donald* case that the rule has no such effect.

P., C. C. & St. L. Ry. Co. v. Moore, 152 Ind., 345.

P., C. C. & St. L. Ry. Co. v. Cox, 55 Ohio St., 497.

C., B. & Q. R. R. Co. v. Bell, 44 Neb., 44.

Beck v. Penn. Co., 63 N. J. Law, 232.

Johnson v. P. & R. Ry. Co., 163 Pa. St., 127.

Ringle v. Penna. R. R. Co., 164 Pa. St., 529.

See also the following decisions by the Federal Courts to the same effect.

Otis v. Penn. Co., 71 Fed., 136, 137-8.

Hamilton v. St. L. K. & N. W., 118 Fed., 92, 94-5.

Atlantic Coast Line R. R. Co. v. Dunning, 166 Fed., 850.

Day v. Atlantic Coast Line R. R. Co., 179 Fed., 26.

2 *There is nothing in the rule of the defendant's Relief Department or the contract of release, that under the decision, results from the acceptance of the benefits on the terms of the membership contract, which is detrimental to the public welfare.*

This was expressly ruled by the Supreme Court of Iowa, in

Donald v. C., B. & Q., 93 Iowa, 284.

Maine v. C., B. & Q., 109 Iowa, 260.

And these decisions are in accordance with a long line of cases to the same effect in other jurisdictions.

The following are these cases in the Federal Courts:

Owen v. B. & O. R. R. Co., 35 Fed., 715.

State v. B. & O. R. R. Co., 36 Fed., 655.

Martin v. B. & O. R. R. Co., 41 Fed., 125.

Otis v. Penna. Co., 71 Fed., 136.

Vickers v. C., B. & Q. Co., 71 Fed., 139.

Shaver v. Penna. Co., 71 Fed., 931.

Hamilton v. R. R. Co., 118 Fed., 92.

Atlantic Coast Line v. Dunning, 166 Fed., 850.

Day v. Atlantic Coast Line R. R. Co., 179 Fed., 26.

The following are the cases to the same effect decided by the state courts:

In Pennsylvania:—*Johnson v. R. R. Co.*, 163 Pa. St., 127; *Ringle v. R. R. Co.*, 164 Pa. St., 529.

In Ohio:—*Ry. Co. v. Cox*, 55 Oh. St., 497; *State v. Ry. Co.*, 68 Oh. St., 9; *Cox v. Ry. Co.*, 1 Oh. N. P., 213.

In Indiana:—*R. R. Co. v. Moore*, 152 Ind., 345; *R. R. Co. v. Hosea*, 152 Ind., 412; *R. R. Co. v. Gipe*, 160 Ind., 360; *Lease v. Penna Co.* (Ind. App.), 37 N. E. Rep., 423.

In Nebraska:—*C., B. & Q. v. Bell*, 44 Neb., 44; *Clinton v. C., B. & Q.*, 60 Neb., 692; *C., B. & Q. v. Curtis*, 51 Neb., 442; *Oyster v. Ry. Co.*, 65 Neb., 789.

In Illinois:—*Eckman v. C., B. & Q. Co.*, 169 Ill., 312.

In New Jersey:—*Beck v. Ry. Co.*, 63 N. J. Law, 232; *Fivey v. R. R. Co.*, 67 N. J. Law, 627.

In Maryland:—*Fuller v. Relief Assn.*, 67 Md., 433.

In Georgia:—*Petty v. Ry. Co.*, 109 Ga., 666; *Carter v. R. R. Co.*, 115 Ga., 853.

In Alabama:—*Harrison v. Ry. Co.*, 144 Ala., 246.

(See quotations from the more fully reasoned of these cases, pp. 68-75, Argument, *infra*.)

IV. The statute cannot be sustained as an authorized exercise of the police power on the ground that it was passed for the protection of labor, and by reason of a supposed inequality of advantage between the employer and its employes.

This ground for sustaining the act, is the main position relied on in the opinion of the court below. (Rec., 70-74; 131 Iowa, 360-366.)

(1) One answer to this position is that there is no basis for assuming that the legislature, in passing the act, had in mind any of these considerations. On the contrary, the act itself and the circumstances under which it was passed, negative any such supposed purpose or motive.

(See discussion, pp. 78-81, Argument, *infra*.)

(2) It will be seen that the act does not provide merely that "any *contract* of relief, benefit or indemnity," etc., shall not constitute a bar or defense, but also that "*the ACCEPTANCE OF any such relief, insurance, benefit or indemnity by the person injured*" shall not "constitute any bar or defense."

As we have seen, it is not the "contract of insurance, relief, benefit or indemnity"—the contract of membership—which constitutes the release—the accord and satisfaction—that is set up in bar in the case before the court.

It is the contract of release—the accord and satisfaction—which, under the previous express decisions of the Supreme Court of Iowa and the other cases cited, *results from the acceptance of the benefits after the injury has occurred.*

It is therefore the prohibition of the statute "*nor shall the acceptance of any such relief, insurance,*

benefit or indemnity, constitute a bar" that avoids the contract of settlement and for that reason it is only this provision that is material to the defense set up.

And all that was said by the court below as to the supposed "inequality of advantage" between the employer and employe at the time the contract of membership was entered into, is in any view wholly immaterial to the real question, whether the prohibition of the contract of release *by the acceptance of benefits* was an authorized exercise of the police power.

(See discussion, pp. 81-83, Argument, *infra*.)

(3) To justify an act of the legislature as a proper exercise of the police power, the court must be satisfied that there was reasonable ground for assuming that the supposed evil which it was intended to remedy in fact existed.

See cases cited, *supra*, pp. 20-21.)

In the case before the court, there is no basis in fact for any assumption by the legislature as a justification for the act, that in the case of the defendant's relief department, "while membership in the relief department was entirely voluntary in the legal sense of the word," "the employer by making the tenure of service *more secure* to those who became members," had brought to bear or would bring to bear "an influence in that direction *savoring of moral coercion*."

Nor is there any basis in fact for any assumption that the employes of the defendant were invited to enter into the particular contract of benefit "under the *express or implied threat* that his refusal will

mark him as the first to be discharged from employment."

(See discussion, pp. 83-85, Argument, *infra*.)

(4) The prohibition of the amendment of the act is limited, as we have seen, to one class of corporations and the one class of claims of liability against such corporations—claims of recovery for injuries resulting from negligent or wilful acts (1) in the operation of the railroad (2) to employees engaged in the particular service connected with its operation.

This class of liabilities, *after the injury has been inflicted and the cause of action has accrued*, differs in no respect, from any other claim of liability because of negligent or wilful acts, whether of the same corporation or of any other corporation, and no reason can be assigned why a different method of settlement and adjustment of this class of claims should be required.

To deny to a railroad company the right to make a contract in the settlement of such claims, is to deny to it the right of private contract. To deny to the employees of the railroad companies the right to make a fair contract for the settlement of such claims, is to deny to employees the right of private contract.

(See discussion, pp. 85-87, Argument, *infra*.)

V. The act cannot be sustained as a valid exercise of the police power on any of the grounds so fully stated in the opinion of the Supreme Court of Iowa (Rec., 68-82; 131 Ia., 357-378), and which presumably are the grounds relied on as sustaining it in this court.

The court below states at length five different alleged reasons, some of which are mere repetitions, in another form, of others, on which it bases its conclusion that the act can be "justified by reference to the police power."

We will consider these different grounds in the order in which they are stated in the opinion.

1. *The act cannot be sustained, as a proper exercise of the police power, on the first ground stated in the opinion—that the original act to which the act in question was an amendment, "created" a right "which did not before exist," and that as to any such right the legislature had inherent power, "in its discretion," to pass any act to protect the right it saw fit.* (Rec., 68-70; 131 Ia., 357-360.)

(See discussion, pp. 87-99, Argument, *infra*.)

See, also, in this connection, the following authorities holding that where an unconstitutional prohibition is part of one general provision, included in the same general language (as here, "any cause of action brought under the provisions of this section") and therefore not separable,—being void, the entire provision should be held void.

Poindexter v. Greenhow, 114 U. S., 270.

Baldwin v. Franks, 120 U. S., 678.

Pollock v. Farmers Loan & Trust Co., 158 U. S., 601, 635-637.

United States v. Ju Toy, 198 U. S., 253, 262.

Employers' Liability Cases, 207 U. S., 463.

Smith v. Peterson, 123 Iowa, 672.

Layman v. Telephone Co., 123 Iowa, 591.

2. *The act cannot be sustained, as an exercise of the police power, on the second ground stated in the opinion—that it is a regulation of the relations between employer and employe, based on the fact that they do not stand on an equal footing with respect to the subject-matter of the legislation and designed to remedy this inequality.* (Rec., 70-74; 131 Ia., 360-366.)

(See discussion, pp. 76-87, Argument, *infra*.)

3. *The act cannot be sustained, as an exercise of the police power, on the third ground stated in the opinion—that there is a “fundamental and ineradicable distinction” between the “inalienable rights” of “a natural person and those of a corporation,” that as to these “inalienable rights” of the natural person “he is born to them,” but that a corporation “has no rights except those with which it is endowed by the law-making power and the power of creation necessarily implies the power of regulation.”* (Rec., 74-75; 131 Ia., 366-367.)

(See discussion, pp. 99-104, Argument, *infra*.)

As to the cases referred to by the court below, as giving support to this supposed distinction, they will be found, on examination, to fall within one of three classes, either

(1) Cases in which there was the reserved power of amendment and repeal, and the particular legislation was held to fall within that power, or

(2) Cases in which it was held that corporations are subject to the same power of regulation by the state as individuals, including the power to prevent an abuse of their corporate franchises, and that as to such power of regulation, they stand in no different relation to the state, or

(3) Cases in which it was held a state has power to impose any conditions it sees fit on the right of foreign corporations to do business in the state.

4. *The act cannot be sustained as an exercise of the police power on the fourth ground stated in the opinion—that the fact that the defendant is a corporation of another state “does not afford it any advantage.”* (Rec., 75-76, 131 Ia., 369.)

(See discussion, pp. 104-105, Argument, *infra*.)

5. *The act cannot be sustained on the fifth ground stated in the opinion of the court—that “the weight of the better reasoned cases supports the conclusion at which we have arrived.”* (Rec., 76-80, 131 Ia., 370-375.)

(See examination of the cases relied on by the court below, pp. 105-108, Argument, *infra*.)

VI. Our contention that the act is an unauthorized interference with the freedom of contract, guaranteed by the Fourteenth Amendment, and for that reason void, is sustained by a number of adjudicated cases, in which similar legislative acts were held unconstitutional on that ground.

Cox v. Railway Co., 1 Ohio N. P., 213.

Farrow v. Railway Co., 7 Ohio N. P., 606.

Shaver v. Penna. Co., 71 Fed., 931.

Sturgiss v. Atlantic Coast Line R. R. Co.,
80 S. C., 167.

Atlantic Coast Line R. R. Co. v. Dunning,
166 Fed., 850.

P. C. C. & St. L. R. Co. v. Cox, 55 Ohio St.,
497.

Railway Co. v. Moore, 152 Ind., 345.

II.

THE STATUTE IN QUESTION IS IN VIOLATION OF THE PROVISION OF THE FOURTEENTH AMENDMENT THAT NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

The purpose of the statute, as we have already shown, was to prohibit the making of the contracts of release by the acceptance of benefits on the terms of the benefit contracts (1) with the particular corporations referred to, (2) by the employes who were within the terms of the act, (3) as to the particular liabilities defined in the act.

Our contention is that the attempted classification made by the act for the purpose of legislation was arbitrary and not based on any reasonable ground of distinction, and that for that reason the act was a denial of the equal protection of the laws.

1. A classification for the purpose of legislation cannot be made arbitrarily, but must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is made.

This proposition is sustained, and its application illustrated, by the following cases decided by this court.

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S., 150, 155, cited with approval in the later cases of *Ry. Co. v. Paul*, 173 U. S., 404, and *Life Assn. v. Mettler*, 185 U. S., 308.

Duncan v. Missouri, 152 U. S., 377, 382.

Ry. Co. v. Smith, 173 U. S., 684, 696.

Cotting v. Stockyards Co., 183 U. S., 79.

Connolly v. Pipe Co., 184 U. S., 540.

Yick Wo v. Hopkins, 118 U. S., 356, 369.

2. The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery,—to the liabilities for negligence of the particular corporations referred to,—railroad corporations—to their employes, does not rest upon any difference which bears a reasonable and just relation to the thing prohibited, and is therefore a mere arbitrary classification.

(See discussion, pp. 120-122, Argument, *infra*.)

(See, also, in this connection, the forcible reasoning of the dissenting opinion of Ladd, J., in the court below, concurred in by Bishop, J., quoted, pp. 122-123, Argument, *infra*.)

3. The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery—to liabilities to a particular class of employees does not rest upon any difference which bears a reasonable and just relation to the thing prohibited, and is therefore a mere arbitrary classification.

(1) That the act cannot be sustained as an act based on a classification of *employees of railroad corporations*, as distinguished from *the employees of other corporations or persons*, is clear from the fact that the act does not apply generally to the employees of railroad corporations, or to the benefit contracts made by them.

(See discussion, pp. 123-124, Argument, *infra*.)

(2) In the nature of things, so far as it may be claimed that there is any classification as to *employees of railroad companies*, the attempted so-called classification bears no such relation to the thing prohibited—the setting up of the contracts of release in bar of the particular class of liabilities provided for in the original act—as made it a proper basis of classification for the purpose of the act.

(See discussion, pp. 124-125, Argument, *infra*.)

(See, also, in this connection, the reasoning of Ladd, J., in the dissenting opinion, quoted, pp. 125-127, Argument, *infra*.)

4. The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery—to the particular class of liabilities for negligent and wilful acts of the corporation referred to, provided for in the act, does not rest upon any difference which bears a reasonable and just relation to the thing prohibited, and is therefore a mere arbitrary classification.

(See discussion, pp. 127-131, Argument, *infra*.)

5. The grounds on which the opinion of the Supreme Court of Iowa bases its ruling that the classification made by the act was not an arbitrary classification, but a reasonable and proper one, are untenable.

1. *The classification can not be sustained on the ground—as held by the Supreme Court of Iowa—that it was based on a classification of railroads as distinguished from other corporations and persons, and for that reason the classification was a proper one for the purpose of the act.*

(See discussion, pp. 131-132, Argument, *infra*.)

2. *The attempted classification for the purpose of the act cannot be sustained on the further ground stated in the opinion that it was a classification for the benefit of a special class of employees.*

(See discussion, pp. 132-134, Argument, *infra*.)

ARGUMENT.

I.

THE STATUTE, THE VALIDITY OF WHICH IS DRAWN IN QUESTION, IS VOID FOR THE REASON THAT IT IS IN VIOLATION OF THE PROVISION OF THE FOURTEENTH AMENDMENT THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

There are certain fundamental propositions, settled by the decisions of this court, to which we call attention in the outset.

(1) *The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to declare unconstitutional and void any act of the legislature which impairs or destroys any right secured by the constitution.*

Smyth v. Ames, 169 U. S., 466.

Cotting v. Stock Yards Co., 183 U. S., 79, 107.

(2) *Corporations are persons within the meaning of the Fourteenth Amendment, as was recognized in the opinion of the court below (Rec., 63), and for that reason cannot be deprived by an act of the legislature of any right guaranteed by it, any more than a natural person.*

Gulf, Col. & S. T. R. R. Co. v. Ellis, 165 U. S., at 154, and cases cited.

(3) *Freedom of contract is one of the inalienable rights which is protected by the provision of*

the Fourteenth Amendment, that no state shall deprive any person of life, liberty or property without due process of law, and for that reason any statute of the state which prohibits its exercise should be declared void by the court unless the act can be sustained as the valid exercise of the police power.

Under the provision of the Fourteenth Amendment that "no person shall be deprived of life, liberty or property without due process of law," freedom to enter into contracts is both a liberty and a property right, secured alike to all persons, natural and artificial, and not to be encroached upon by the state under guise of its police power.

In the words of the opinion of Mr. Justice Peckham in *Allgeyer v. Louisiana*, 165 U. S., 578:

"The liberty mentioned in that amendment (14th) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose *to enter upon all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

In *Lochner v. New York*, 198 U. S., 45, the court, Mr. Justice Peckham delivering the opinion, citing *Allgeyer v. Louisiana*, *supra*, with approval, say:

"The general right to make a contract in relation to its business, *is part of the liberty of the individual, protected by the Fourteenth Amendment of the Federal Constitution.*"

See also:

Connolly v. Union Sewer Pipe Co., 184 U. S., 540.

Liberty to make contracts not immoral nor offensive to the public welfare, being one of the cardinal liberties and property rights possessed by all persons, natural or corporate, cannot be taken away by legislative enactment not within the police power consistently with "due process of law," that is, the "law of the land" designed to protect all persons in the enjoyment of their liberty and property against all arbitrary and oppressive impositions, whether by the legislature, the executive or the courts.

Lochner v. New York, 198 U. S., 45.

Adair v. United States, 208 U. S., 161.

McLean v. Arkansas, 211 U. S., 539.

1. Under the express decisions of the Supreme Court of Iowa rendered prior to the passage of the act in question, and a long line of decisions of other courts, the contract of accord and satisfaction resulting from the acceptance of benefits under the contract of membership, was a contract based on mutual considerations, and valid and enforceable as lawfully made by the parties in the exercise of their power to contract.

We have already referred to the two cases decided by the Supreme Court of Iowa, without quoting from them, in our Statement of the case, and will now quote from the opinions the clear and forcible statements of the reasons on which they were based.

In *Donald v. C., B. & Q. Ry. Co.* (1895), 93 Iowa, 284, the entire facts as to the plaintiff in error's relief department and its organization and purposes, substantially as in the case before the court, were presented.

The court said:

"The department is *purely voluntary*, as to its membership, and none, other than employees of the defendant company, are eligible to membership." * * *

"The basis of membership is a written application, showing the moral and physical qualifications essential to it. *Employment in the company in no way depends upon membership in the relief department.* * * * In case of injuries for which the company would be liable, Maiken or his beneficiaries have the right of action for damages, and *that right is not abridged by the contract of membership in the relief department.* By mutual contributions of both the members and the company, a fund is provided, and is available to a member injured by the company, whether in a way to render it liable for damages or not. The member in his contract, *agrees with the company that in consideration of its contributions to the fund, if he is injured, he will not take the benefit thus provided, and, besides, ask for damages because of the injury, but he has his election which he will take.* Such a contract fixes his right as a member of the Relief Department; that is, *upon what terms he may receive payment from the department.* * * * But such a contract is said to be against public policy. We do not see why. It is not a contract by which the company can escape a legal liability for its torts. The way is entirely open for the prosecution of any claim for negligence against the company, and damages are obtainable to the full amount of the injuries sustained. There is no phase of public policy that prohibits any person agreeing that such full compensation, or whatever he may accept as a compensation, shall be in lieu of any claim he might otherwise have against the relief fund. It seems to be the thought, ~~included~~ ^{included} in the contract, that the company shall not be compelled to pay damages for the injury sustained, and also to contribute to a fund for ad-

ditional relief. Such an agreement seems not only not against public policy, but seems NOT IN-EQUITABLE." * * *

"The employe, when such liability arises, has his choice to take the damages, as he may be able to establish them, OR the benefits from the association. The company is liable for EITHER at the election of the employe, but not for BOTH. SUCH FACTS DO NOT AMOUNT TO A RESTRICTION ON LIABILITY."

In *Maine v. C., B. & Q. R. R. Co.* (1899), 109 Iowa, 260, the court was asked to reconsider its decision in the *Donald* case, *supra*.

The court in adhering to its decision in the *Donald* say:

"Substantially all of the objections thus made were considered by us in the recent case of Donald v. Railway Co., 93 Iowa, 284; and held not to be well founded. We are content with the conclusions there announced, and do not deem it necessary to review them." * * *

It is said that the employes of the defendant are subjected to such influences that they feel *compelled to join* the department for fear of losing their places, and that it is *voluntary, only in name*. The record submitted to us does not show any compulsion or undue influence upon which a court could act. *The regulations of the department expressly provide that NO EMPLOYE SHALL BE COMPELLED to become a member of it, and that any member MAY WITHDRAW at the end of any month upon giving notice before the 25th of the month.* * * * *The plaintiff, after receiving the injuries in question, HAD THE RIGHT TO ELECT to accept the benefits provided by the relief department, OR to hold the defendant responsible for its alleged negligence. By accepting the benefits named, HE ELECTED NOT TO HOLD THE DEFENDANT LIABLE."*

On the rehearing, a supplemental opinion was filed in which the court adhered to the conclusion of its first opinion. The court say:

"That conclusion now appears to be IN HARMONY WITH THE HOLDINGS OF ALL COURTS OF LAST RESORT WHICH HAVE CONSIDERED THE PRINCIPLE INVOLVED, AND TO BE WELL FOUNDED IN REASON."

The Supreme Court of Iowa, in its opinion in the case before the court, refers to these two previous decisions and recognizes them as settling the law in Iowa on the subject of the binding force of such contracts of settlement, and as establishing their validity, unless the statute in question,—which was passed subsequently and for the conceded purpose of prohibiting the making of such contracts in the future—can be sustained as an authorized exercise of the police power.

Referring to these decisions, the court say:

"Prior to the adoption of the amendment, it was held by this court that the relief contract was not void as being against public policy, and employes of a railroad who accepted benefits from the association on account of injuries received in the company's service *were held to be barred from the recovery of damages. Donald v. Ry. Co.*, 93 Ia., 284; *Maine v. Ry. Co.*, 109 Ia., 260."

These two decisions of the Supreme Court of Iowa, which, as we have seen, settled the law in Iowa on the subject, are in accordance with a long line of decisions in other jurisdictions, in which the same question, as to the same or similar Relief Department contracts, was raised and the contract of settlement was sustained.

(See *infra*, pp. 65-67, where these cases are cited.)

2. It is indisputable that the purpose of the act in question was to prohibit the exercise in the future by the corporations referred to in the act, and their employes, of the power to make contracts of settlement like the contract in question (which the previous decisions of the Supreme Court of Iowa had held they had), and for that reason—as was also held by the court below—the act, if sustained at all, must be sustained as an authorized exercise of the police power.

It was expressly held by the Supreme Court of Iowa, in its opinion in the case before the court (Rec., 59), that the purpose of the act in question, passed subsequent to these decisions, was to prohibit the making of such contracts in the future.

That the act—the recognized purpose of which was thus to take away from the parties the power they had to contract on this subject—must be sustained, if sustained at all, as a valid exercise of the police power, was also expressly held in the opinion of the Supreme Court of Iowa.

The court say (Rec., 65-66):

“Is the statute an unwarranted interference with *liberty of contract*? * * * This right, like all others possessed by the individual member of society, is held subject to such reasonable restrictions and regulations as may be imposed for the general good. *The power by which these limitations are imposed upon the liberty of the individual is commonly called the ‘police power.’*”

After holding that the law was not invalid as class legislation, the court states the remaining question as to the constitutionality of the law and its conclusion on the question in the following language (Rec., 68):

“Assuming then, that the statute is not to be avoided as class legislation, or as depriving railway corporations of the equal protection of the laws, let us inquire whether it is of such manifestly arbitrary and unreasonable character that it cannot be justified *by reference to the police power?* For several reasons we are constrained to answer this inquiry in the *negative.*”

3. To establish the validity of a statute which prohibits the exercise of the power to make contracts that would otherwise be lawful, on the only ground on which such a statute can be sustained—that it was an authorized exercise of the police power by the legislature,—it must be shown, first, that the purpose of the statute was one within the police power, and second, that the particular statute was reasonably appropriate to accomplish such purpose.

The police power of the state is limited to such enactments as have some reasonable tendency to promote the public health, safety, morals, or welfare. In order to establish the validity of a law enacted under the police power, it must appear to the court, 1st, that the end in view is the promotion of some or all of these objects, and, 2nd, that the law is appropriate and reasonably necessary to the end.

In *Mugler v. Kansas*, 123 U. S., 623, 661, the court say:

“The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, *has no real*

or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thus give effect to the constitution."

In *Lawton v. Steele*, 152 U. S., 133, 137, this court (Mr. Justice Brown delivering the opinion), say:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The legislative enactment must always be *fairly and reasonably necessary to attain the proper objects of the police power*, and the power must be exercised in subordination to the provisions of the federal constitution.

Ry. Co. v. Smith, 173 U. S., 684, 689, 699.

In *Lochner v. N. Y.*, 198 U. S., 45, this court held that a statute providing that no employe shall be required or permitted to work in bakeries more than a certain number of hours in a week or a day was not a legitimate exercise of the police power of the state but was an unreasonable and arbitrary interference with the liberty of contract, and as such was in conflict with and void under the Fourteenth Amendment.

The court say:

"The statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S., 578. Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."

The court, after referring to and distinguishing its previous decisions sustaining statutes which interfered with the right of contract as valid exercise of the police power, say:

*"In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor. * * **

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is

no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act."

In *Adair v. United States*, 208 U. S., 161, this court held that it was not within the power of Congress to enact a statute which prohibited a carrier engaged in interstate commerce, or an agent or officer thereof, to discharge an employe simply because of his membership in a labor organization, and that such an act was an invasion of personal liberty as well as of the right of property, guaranteed by the Fifth Amendment to the Constitution, and was therefore repugnant to the declaration of that amendment that no person shall be deprived of liberty or property without due process of law.

The court (Mr. Justice Harlan delivering the opinion) say:

"In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law UPON REASONABLE GROUNDS, forbids as inconsistent with the public interests or as

*hurtful to the public order or as detrimental to the common good. * * * It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employe of the railroad company upon the terms offered to him."*

The court, after citing and quoting from *Allgeyer v. La.*, 165 U. S., 578, and *Lochner v. N. Y.*, 198 U. S., 45, say:

"Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was NO DISAGREEMENT AS TO THE GENERAL PROPOSITION THAT THERE IS A LIBERTY TO CONTRACT WHICH CANNOT BE UNREASONABLY INTERFERED WITH BY LEGISLATION."

4. The statute cannot be sustained as an authorized exercise of the police power.

In determining whether a particular act was an authorized exercise of the police power, it is always necessary to ascertain from an examination of the act itself, (1) whether *the end in view* was one for which the exercise of the police power was authorized, and (2) whether the means employed by the statute were appropriate *to that end*.

See the authorities cited *supra*.

It is, therefore, important in the outset to have clearly in mind as bearing on the question of the constitutionality of the statute, the validity of which is in question—whether it was an unauthorized interference with the freedom of contract or a denial of the equal protection of the laws—the precise purpose and effect of the statute.

The act, the validity of which is in question, did not prohibit or otherwise make unlawful the contracts of benefit, or the contracts of release by

the acceptance of benefits under them, but only provided that such contracts, and the acceptance of benefits under them, should not bar a recovery (1) from the class of corporations referred to, (2) by a particular class of employes, (3) for a particular class of liabilities.

The act is in terms an amendment to Section 2071 of the Iowa Code (see *supra*, pp. 14-15) and it provides, not that such "contracts of insurance, relief, benefit," etc., shall not be made nor that they shall be void, but only that no such contract, nor "the acceptance of any such relief, insurance, benefit or indemnity" under such a contract, shall "constitute any bar or defense to any cause of action brought under the provisions of this section."

What constitutes "a cause of action brought under the provisions of this section" has been settled by numerous decisions of the Supreme Court of Iowa.

It is settled by these decisions that the statute—to causes of action "brought under" which, the prohibition of the amendatory act is thus limited—*only authorizes a recovery* in suits brought, (1) against *railway corporations*, (2) by a *limited class of the employes* of such corporations,—those whose ordinary duties are connected with the operation of the railroad,— and (3) for damages for injury or death resulting from negligence *connected with the operation of the railroad*—the movement of trains, etc., over the tracks of the company.

See,

Deppe v. R. R. Co., 36 Iowa, 52.

Malone v. Ry. Co., 65 Iowa, 417.

Akerson v. Ry. Co., 106 Iowa, 54.

Reddington v. Ry. Co., 108 Iowa, 96.

Hughes v. Ry. Co., 128 Iowa, 207.

Dunn v. Ry. Co., 130 Iowa, 580.

And it follows, on the other hand, that in all that class of cases not within the provisions of the particular statute, for the reason that the injury did not result from negligence or wilful acts *in the operation of the railroad*, but in some other branch of the service, *in which there was a common law liability for negligence*—the large class of cases in which the fellow servant rule did not apply—there could be a recovery at common law.

See as illustrating this:

Baldwin v. St. L. K. & N. Ry. Co., 75 Ia., 297.

McQueeney v. C., M. & St. P. Ry. Co., 120 Ia., at 524.

Beresford v. Am. Coal Co., 124 Ia., 34.

Klaffke v. Bettendorf Axle Co., 125 Ia., 223.

Scott v. Iowa Telephone Co., 126 Ia., 524, at 527.

It will thus be seen that the provision of the amendatory act against the use of contracts of relief, etc., or the acceptance of benefits under such contracts, as a defense to causes of action brought under the section to which it is an amendment, operates to prevent such use only in the class of suits brought against *railway corporations by the limited class of the employees of such corporations* provided for in the act.

In all other suits by employees against their employers for damages for personal injuries, that is to say, in *all* such suits against employers who are

not corporations operating railways and in all such suits against railway corporations *not within the limited class of cases affected by the statute*, such contracts, if they exist, may be set up as a defense, and, under the express decisions of the Supreme Court of Iowa in *Donald v. R. R. Co.*, 93 Iowa, 284, and *Maine v. R. R. Co.*, 109 Iowa, 260, will be enforced according to their terms.

The act manifestly has no possible relation to the public health or public morals, and must therefore be sustained, if sustained at all, as a proper exercise of the police power, either (1) on the ground that it was an act passed to promote the public safety, or (2) on the ground that it was an act passed to promote the public welfare.

I. Under the express decisions of the Supreme Court of Iowa, and the other cases cited *infra*, the voluntary acceptance of the benefits constituted a settlement of the claim of liability—an accord and satisfaction—in no material respect different from any other settlement. And there is nothing in the nature of such a contract of settlement to justify prohibitive legislation differentiating it from other contracts of settlement between railroad companies and their employes.

*1. Under the express decisions of the Supreme Court of Iowa, and the other cases cited *infra*, the contract made by the acceptance of the benefits constitutes a settlement—an accord and satisfaction—between the parties, for the same reasons and in the same way and to the same extent as any other settlement.*

(1) There is the same opportunity on the part of

the employe in both cases to accept the amount offered, or to reject it and sue the company, and the same opportunity to consult counsel, before electing to accept, as in any other case of an offer of settlement.

(2) There is the same voluntary election to accept the amount in full settlement, the same payment of the full amount offered in settlement, and the same acceptance of it in full settlement.

(3) There is the same mutuality of contract between the company and the employe, and the settlement is based in like manner on an agreed consideration, accepted in full settlement.

In what respect material to the question of *the power of the legislature to prohibit such settlements* and thus prohibit the exercise by the employe and employer of *the power to contract*, does such a settlement differ from any other?

The only possible difference between the two transactions is in the fact that in the one case the money accepted in full payment is paid from the funds of the Relief Department, and in the other from the treasury of the company.

But what possible difference can this make to the only party other than the company who is interested in the settlement—the employe to whom the money is paid?

In either case he receives and accepts the full amount he agreed to accept, and it can make no possible difference to him whether the money thus received and accepted comes from the Relief Department or from the company.

In the one case the money received is the money which the Relief Department had agreed with the

company, in consideration of its contributions to the support and maintenance of the Relief Department, that it would pay.

In the other case it is the money paid by the company itself, but for the same purpose—that of settling in full on the terms agreed on.

The only possible claim that can be made must be that somehow because the employe has paid dues to the Relief Department, this payment gave him a right to the benefits, and therefore the case is different.

But this reasoning ignores the fact that the dues were paid to the Relief Department in consideration of the agreement of the Relief Department, to which all the members and the company itself were parties, to do the things—and only the things—it agreed to do for the benefit of the employes paying the dues.

These were:

(1) To in effect insure the employe becoming a member against sickness or injury to the extent of the amount of the benefits agreed to be paid on the terms of the agreement.

(2) To pay this amount in any case of either injury or sickness—wholly irrespective of whether there was any liability or claim of liability against the company or not,—and therefore to pay it as well in the very large class of cases in which there would be no such liability or claim of liability, as those in which there was.

(3) In case the employe was injured and there was a claim of liability of the company on his part, *to give him the right to elect EITHER to ask for and accept the FULL amount AND NO LESS, wholly irrespec-*

tive of whether his claim of liability had any substantial merit and however doubtful and uncertain it might be, *or to REJECT the offered amount and bring suit* against the company to recover *the full amount claimed by him.*

(4) It was, however, agreed between the parties that in case the employe *elected* to accept the benefits, with this opportunity to accept or reject them, he should not have the right to *ALSO sue the company and thus recover* DOUBLE COMPENSATION FOR HIS INJURY, but that the amount should be accepted, if accepted at all, *in full settlement* as in the case of any other settlement.

That this was a fair and not an inequitable agreement, as expressly held in the Donald case, is illustrated by the facts of the case before the court.

The record shows that McGuire only paid 85 cents as his dues, and received in benefits and medical and hospital attendance \$822. (Rec., 8-9.) On the other hand, the record shows that during the period since its organization in 1899, up to December 1, 1900, the Relief Department, had paid in benefits for *sickness* \$1,294,790, and for *injuries*, \$1,376,720—a total of \$2,671,510—(Rec., 8), and that during the same period, the Railroad Company, in addition to guaranteeing the relief department against loss in investments or by defalcation, or otherwise, and paying the agreed rate of interest on balances, has contributed *in money* to maintain the department and in rental and services, \$1,171,683, and to make up deficiencies in the fund, \$42,432—a total of \$1,214,115—(Rec., 7), or *nearly half as much as the entire amount paid for benefits.*

2. *The grounds relied on to sustain the statute prohibiting the settlements in question in this case, as a proper exercise of the police power, would apply equally to a statute prohibiting ALL settlements of claims of liability by employes.*

In the case of the acceptance of the amount of the benefits in settlement, the employe receives the amount in money which he is willing to take and accept in full settlement, precisely as in the case of a settlement which is consummated by the payment of the money by the company itself instead of by the Relief Department.

It can afford no possible ground for legislation, that the money thus accepted was paid by the Relief Department instead of by the company itself on the same terms *that, if accepted, it should be accepted in full settlement.*

The transaction being the same in every other particular as that of any other settlement, if there was any possible ground for the exercise of the police power as to the one class of settlements which there was not in the other, it must be based on this fact, which constitutes the only difference between the two transactions of settlement.

What possible basis can be found in this fact which would in itself justify such a prohibitory law as an exercise of the police power?

How is the public or any class of the public affected injuriously by the fact that the money which by its very voluntary acceptance the employe has agreed to accept in settlement, was paid out of the Relief Department fund instead of out of the treasury of the company?

There was in both cases the same opportunity to the employe to elect, the same voluntary election,

the same payment of the full amount agreed to be paid, and the same acceptance of the amount paid in full settlement.

The only possible difference between such a settlement and any other settlement is in the fact that the money thus offered and accepted and paid to the employe in full settlement, was by agreement of all the parties interested, paid from the benefit fund, to which the company had contributed, on the terms agreed to, instead of the funds of the company.

It will be seen in the first place that this does not change the fact that the amount paid was by the voluntary election of the employe, accepted in full satisfaction of any claim of recovery, in the same way as in the case of any other settlement.

And it would seem clear that as to the only thing necessary to be determined by the employe before binding himself—whether he would accept or reject the amount offered in full settlement for his injury—it is wholly immaterial whether the money thus received was paid in whole or only in part by the company.

On the other hand, no wrong or injustice was done to the employe under the facts, in thus paying the benefits from the fund thus derived, for the reason that it was by agreement of all the parties who had contributed to it, in consideration of the contribution and agreements made by the company.

If the motive of the statute was because of the hazards of the railroad business, this would apply with equal force to sustain a statute prohibiting all settlements.

If any supposed inequality was the motive of the act, this would apply equally to all settlements.

And in the same way any of the other possible

grounds for sustaining the act as an authorized exercise of the police power, would apply equally in the case of any other settlement between the company and the employe as in that of the particular settlements prohibited by the act.

II. The statute cannot be sustained as an exercise of the police power on the ground that the end in view was to promote the public safety, and that it was appropriate and reasonably necessary to that end.

(1) *The act itself shows that its purpose—"the end in view"—was not to promote the public safety, but some other wholly different purpose.*

The only theory on which such a contention can be urged is that it was the purpose of the legislature to discourage negligence, and thereby encourage greater care on the part of railroad companies, by prohibiting such contracts releasing liabilities for negligence.

In the first place, there is nothing in the language of the act which expresses any such purpose and the theory that such was the purpose of the legislature is at the most a mere conjecture as to the *possible* purpose of the legislature.

In the second place, if it was in the mind of the legislature to discourage negligence by prohibiting the particular settlements of liabilities for negligence by the acceptance of the benefits after the injury, this reason would have applied equally to any other settlement by employes of liabilities for negligence.

There was nothing in the fact that the particular settlements prohibited were by the acceptance of benefits from the relief fund, instead of money paid from the funds of the company itself, that would call

for a different provision as to them, and if the purpose of the act was to discourage negligence by prohibiting settlements of liabilities for negligence, it would have prohibited *all* such settlements.

And that the legislature acted on no such view, is conclusively shown by the fact that, in the same act, it is expressly provided that nothing contained in the act "shall be construed to prevent or invalidate *any settlement for damages between the parties* subsequent to the injuries received."

In the third place, the language of the act itself shows that the legislature did not have in mind to prohibit settlements of liabilities *for negligence*, but merely to prohibit the settlement, in the particular way, of *any* liabilities of a railway company for injuries to employes, as well those for *wilful* wrongs, as those for *negligence*.

On reference to the original act, it will be seen that, by its express terms, the corporations referred to are made "liable for *all* damages sustained by *any* person" not only in "consequence of the *neglect* of" its employes, but also in "consequence of the *wilful wrongs*, whether of commission or omission" of the "agents, engineers or other employes" of the company.

And the amendatory act expressly provides that the release by the acceptance of benefits shall not "constitute any bar or defense" to "*any* cause of action brought under" the original act.

(2) *Even if it is assumed that the "end in view" was to promote the public safety, the prohibition was not appropriate and reasonably necessary for that purpose.*

The act has no such relation to the public safety,

in its reasonable effect and operation, as is necessary to justify it as an exercise of the police power to protect the public safety.

While the particular corporations to which the act related were engaged in the hazardous business of operating railroads, the act did not purport to impose any regulations to promote the public safety, or otherwise guard against the hazards of the business.

It only related to contracts of benefit and the contract of release which the courts of the state had previously held resulted from the acceptance of benefits, under the terms of the contract of benefit, after the injury had occurred and the liability had accrued.

It did not attempt to regulate the conduct of railroads in any way to protect the life or limb of its employes, or the public, and thus promote the public safety.

Finally, as expressly held by the Supreme Court of Iowa in the cases cited *supra*, there was nothing in the contracts of benefit which in any way limited the liability of the company for negligence. They were not contracts to limit or release the liability when it was incurred. The release of the liability only resulted from the voluntary acceptance of the benefits after the injury had occurred, and with the opportunity to elect whether to accept them or not, and there is no view in which the prohibition of such releases *by acts done after the injury* would discourage negligence.

The clear and forcible reasoning of the Supreme Court of Ohio in *Pittsburg, C. C. & St. L. Ry. Co. v. Cox*, 55 Ohio St., 497, at p. 513, is conclusive on this point:

"Is the contract itself against public policy? To be so it must in some manner contravene public right or the public welfare. It must be shown to have a mischievous tendency as regards the public. And this should clearly appear. *The ground urged is that it tends to make the company less careful in the operation of its road; in other words, it encourages negligence.* * * * *But this claim arises, we think, from a misconception of the contract,—in assuming that, by the contract, the employe releases some future right of action against the company. On a previous page we have undertaken to show that such is not the case; that there is NO WAIVER OF ANY CAUSE OF ACTION which the employe may become entitled to, and that it is not THE SIGNING of the contract, but THE ACCEPTANCE OF BENEFITS after the ACCIDENT THAT CONSTITUTES THE RELEASE. When that occurs, he is not stipulating for the future; he is but settling for the past. HE ACCEPTS COMPENSATION FOR INJURY ALREADY RECEIVED.* * * *

If he is injured, and the company is not liable (a condition which follows in much the larger proportion of the accidents to employes on railroads), he may accept the benefits; if the company is liable he may decline benefits and sue. *How can this injuriously affect the public? Is it not, on the other hand, A WISE AND HUMANE PROVISION for many of a class who, without it, when sick or injured, would be compelled to look to public charity for aid? AND DOES IT NOT HOLD OUT AN INCENTIVE TO FAITHFUL, EFFICIENT SERVICE by encouraging expectation of benefits when the member becomes superannuated, and encourage economy and thrift by laying up something against a time of need? WE FAIL TO SEE HOW THE CONTRACT, TAKEN AS A WHOLE, ENCOURAGES THE EMPLOYMENT OF CARELESS MEN.* * * * *It cannot be said that the beneficial feature of the contract tends to make the employe less careful, and therefore, is inimical to the public; for to do so would be to condemn the whole theory of insurance, and especially that relating to fire and acci-*

dent, NOR IS THE CONTRACT A COMPULSORY ONE. IT IS ENTERED INTO VOLUNTARILY."

See further in this connection, *infra*, pp. 64-75, where this point is more fully considered.

III. The statute cannot be sustained as an exercise of the police power on the ground that the end in view was to promote the public welfare and that it was appropriate and reasonably necessary to that end.

1. *Neither the rule of the defendant's Relief Department nor the contract of membership, nor the contract of release, which, under the decisions results from the acceptance of the benefits after the cause of action has accrued, limits in any way the company's liability for negligence.*

In the case of *Donald v. C., B. & Q. R. R. Co.*, 93 Ia., 284, the Supreme Court of Iowa, after a careful consideration of the rule of the defendant's Relief Department, including the provision of the contract of membership, that the acceptance of benefits after the right of action had accrued, should be a release, said:

"It is said that the contract is contrary to the express terms of code, Section 1307, which provides that any contract RESTRICTING THE LIABILITIES of railway companies for the neglect or mismanagement of their employes in connection with the operation of railways shall not be legal or binding. But we have said, and the authorities cited hold, that such contracts are IN NO WAY A RESTRICTION ON SUCH LIBERTY. The employe, when such liability arises, HAS HIS CHOICE to take the damages, as he may be able to establish them, OR the benefit from the association. The company is liable for EITHER, at the election of the employe, but not for BOTH. Such facts do not amount to A RESTRICTION ON LIABILITY."

Again, in the subsequent case of *Maine v. C., B. & Q.*, 109 Ia., 260, after the whole subject of the validity and effect of the rule and release by the acceptance of benefits had been re-argued, the court unanimously affirmed its decision in the *Donald* case.

Every court of last resort in the United States, in which the point has been raised that this rule has a tendency to limit the company's liability for its negligence has concurred with the court's holding in the *Donald* case that the rule has no such effect.

P., C., C. & St. P. Ry. Co. v. Moore, 152 Ind., 345.

P., C., C. & St. L. Ry. Co. v. Cox, 55 Ohio St., 497.

C., B. & Q. R. R. Co. v. Bell, 44 Neb., 44.

Beck v. Penn. Co., 63 N. J. Law, 232.

Johnson v. P. & R. R. R. Co., 163 Pa. St., 127.

Ringle v. Penna. R. R. Co., 164 Pa. St., 529.

See also the following decisions by the Federal Courts to the same effect:

Otis v Penn. Co., 71 Fed., 136, 137-8.

Hamilton v. St. L. K. & N. W., 118 Fed., 92, 94-5.

Atlantic Coast Line R. R. Co. v. Dunning, 166 Fed., 850.

Day v. Atlantic Coast Line R. R. Co., 179 Fed., 26.

2. *There is nothing in the rule of the defendant's Relief Department or the contract of release, that under the decision, results from the acceptance of the benefits on the terms of the membership contract, which is detrimental to the public welfare.*

It has been decided by all the courts of last re-

sort and by different Federal Courts which have had occasion to pass on this rule of defendant's Relief Department, or the like rule of other relief departments, that there is nothing in the rule or the resulting contract of release in case of the acceptance of benefits, which is contrary to public policy, or otherwise detrimental to the public welfare, but that on the contrary, such Benefit Associations are *beneficial and deserving of commendation*.

The Supreme Court of Iowa in the Donald case, *supra*, having before it this rule and the same facts as to the defendant's Relief Department as appeared in the case before the court, say:

"But such a contract is said to be against public policy. *We do not see why. It is not a contract by which the company can escape a legal liability for its torts. The way is entirely open for the prosecution of any claim for negligence against the company, and damages are obtainable to the full amount of the injuries sustained. There is no PHASE OF PUBLIC POLICY THAT PROHIBITS any person agreeing that such full compensation, or whatever he may accept as compensation, shall be in lieu of any claim he might otherwise have against the relief fund.*" (93 Iowa, 293.)

And this ruling was re-affirmed in the Maine case, *supra*.

And these decisions are in accordance with a long line of cases to the same effect in other jurisdictions.

The following are these cases in the Federal Courts:

Owen v. B. & O. R. R. Co., 35 Fed., 715.

State v. B. & O. R. R. Co., 36 Fed., 655.

Martin v. B. & O. R. R. Co., 41 Fed., 125.

Otis v. Penna. Co., 71 Fed., 136.

- Vickers v. C., B. & Q. Co.*, 71 Fed., 139.
Shaver v. Penna. Co., 71 Fed., 931.
Hamilton v. R. R. Co., 118 Fed., 92.
Atlantic Coast Line R. R. Co. v. Dunning,
 166 Fed., 850.
Day v. Atlantic Coast Line R. R. Co., 179
 Fed., 26 (Court of Appeals, 4th Circuit,
 April, 1910).

The following are the cases to the same effect decided by the state courts:

In Pennsylvania:—*Johnson v. R. R. Co.*, 163 Pa. St., 157; *Ringle v. R. R. Co.*, 164 Pa. St., 529.

In Ohio:—*Ry. Co. v. Cox*, 55 Oh. St., 497; *State v. Ry. Co.*, 68 Oh. St., 9; *Cox v. Ry. Co.*, 1 Oh. N. P., 213.

In Indiana:—*R. R. Co. v. Moore*, 152 Ind., 345; *R. R. Co. v. Hosea*, 152 Ind., 412; *R. R. Co. v. Gipe*, 160 Ind., 360; *Lease v. Penna. Co.* (Ind. App.), 37 N. E. Rep., 423.

In Nebraska:—*C., B. & Q. v. Bell*, 44 Neb., 44; *Clinton v. C., B. & Q.*, 60 Neb., 692; *C., B. & Q. v. Curtis*, 51 Neb., 442; *Oyster v. Ry. Co.*, 65 Neb., 789.

In Illinois:—*Eckman v. C., B. & Q. Co.*, 169 Ill., 312.

In New Jersey:—*Beck v. Ry. Co.*, 63 N. J. Law, 232; *Fivey v. R. R. Co.*, 67 N. J. Law, 627.

In Maryland:—*Fuller v. Relief Assn.*, 67 Md., 433.

In Georgia:—*Petty v. Ry. Co.*, 109 Ga., 666; *Carter v. R. R. Co.*, 115 Ga., 853.

In Alabama:—*Harrison v. Ry. Co.*, 144 Ala., 246.

The only cases cited in the court below to the contrary of these decisions were *Miller v. C., B. & Q. Ry. Co.*, 65 Fed., 305, decided by a district judge, and *R. R. Co. v. Montgomery*, 152 Ind., 1.

As to *Miller v. C., B. & Q. R. Co.*, on appeal (*C.*,

B. & Q. R. Co. v. Miller, 76 Fed., 439), a contrary ruling was made on the question of the validity of such a contract of settlement as the one in question in this case, and the case of *Donald v. Railroad Company*, and others of the cases cited *supra*, were cited with approval. The court, however, affirmed the judgment of the court below on the ground that the facts were not set out with sufficient fullness and certainty to show that the particular contract of settlement was of the kind involved in the decisions referred to.

In addition to this, there are the other cases decided by federal courts, cited *supra*, which are contrary to this decision of the district judge in *C., B. & Q. R. Co. v. Miller*.

The second of these cases—*R. R. Co. v. Montgomery*, 152 Ind., 1—was expressly overruled by the court which decided it in *R. R. Co. v. Moore*, 152 Ind., 345.

These authorities concur in sustaining the following propositions:

1. The contract made by the member of the Relief Department, to the effect that if he voluntarily accepts benefits after an injury he will not sue for damages, is not a contract by which the employer is exempted from liability for negligence, for the reason that the contract gives the member the option of suing for damages or accepting the benefits, and if he elects to accept benefits, *he has in effect made a contract after his injury for the compromise of his claim, and is bound by his settlement just as much as he would be by any other compromise made in good faith.*

2. The contract of the Relief Department, by which the option of an election of remedies is given,

is not against public policy, but on the contrary is a contract *worthy of commendation and protection, providing as it does for benefits in cases of injury or sickness for which the employer is not at all responsible.*

3. The contract of accord and satisfaction which results from the acceptance of the benefits after the injury has occurred, with the opportunity of election, is a contract based on mutual obligations of the employer and employe to contribute to the relief fund on the terms provided, and for that reason is a contract between the company and its employes based on a sufficient and valid consideration.

We have already quoted fully, *supra*, from the two cases, decided by the Supreme Court of Iowa on this point, and refer the court again in this connection to what is there said.

We have also selected from the large number of other cases, both state and federal, two of the most frequently cited of the state court decisions, and five of the more fully reasoned of the many cases decided by the federal courts, which hold that the contracts of settlement prohibited by the statute in question are in no material respects different from other contracts of settlement and are in no way detrimental to the public welfare or to the welfare of the class of employes affected by them.

The more fully reasoned cases as to the defendants' relief department and similar relief departments, which define and give the reasons for sustaining the contracts of settlement by the acceptance of benefits.

In *Johnson v. Philadelphia & Reading Railway Co.*, 163 Pa. St., 127 (cited with approval by the Supreme

Court of Iowa in the Donald case, *supra*), the court, in holding that the contract and acceptance of benefits were a bar to a recovery, say:

"There is no provision exempting the company from liability for future negligence. The benefits, by the regulations of the relief association, become due to members whenever disabled by accident in the railroad company's service, or by sickness or injury other than in the company's service, without reference to the question of negligence at all. As these provisions include benefits in cases of accident pure and simple, of injury by the negligence of fellow workmen, and by the member's own contributory negligence, it is apparent that they cover a wide field in which there is no liability of the railroad company at all. Such cases are probably a large majority of those occurring to railroad employes, and the association therefore is of the highest order of beneficial societies. But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. He may as well accept it in installments as in a single sum, and from an appointed fund to which the company has contributed, as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former he cannot justly ask the latter in addition."

In *Leas v. Pennsylvania Co.*, 37 N. E., 423 (Ind.), the court say:

"Notwithstanding the contract made with the employe in advance of the injury, the fact remains true that the appellant was in NO SENSE COMPELLED to receive the compensation growing out of the relief fund, and that, when he did so, he practically made A NEW CONTRACT with the company, BY WHICH HE AGREED TO ACCEPT the amount offered him in full satisfaction of the damages."
* * *

*"Nor is it easy to perceive upon what principle the contract can be held void from considerations of public policy. There is no rule of public policy which discourages the SETTLEMENT OF CLAIMS of this character BY COMPROMISE, when made in good faith; and, as we have seen, the payment and acceptance of the benefit money in the present case was NOTHING MORE NOR LESS THAN AN ADJUSTMENT AND COMPROMISE OF THE CLAIM AFTER THE INJURY. Besides the general beneficial results inuring to a member of this association are such as TO COMMEND IT TO PUBLIC FAVOR RATHER THAN OTHERWISE. * * * There could certainly be no just ground upon which the general contract of membership, and its resulting benefits could be held void as against public policy. The only basis upon which such a claim could stand for a moment is that that portion of the contract by virtue of which the acceptance of benefits operates as a release of the company is an attempt to contract against liability for negligence in advance of any injury. The impediment in the way of such a conclusion, however, is that the CONTRACT out of which the release arises is REALLY NOT CONCLUDED UNTIL AFTER THE INJURY, and that the same IS BASED UPON A CONSIDERATION PAID AND VOLUNTARILY ACCEPTED, also subsequently to the injury; and THESE SEVERAL ACTS constitute the contract A COMPROMISE BETWEEN THE PARTIES, which is not obnoxious to, BUT FAVORED BY, CONSIDERATIONS OF PUBLIC POLICY."*

In *Otis v. Pennsylvania Co.*, 71 Fed., 136, the court (Baker, J.) say:

“As a general proposition, it is unquestionably true that a railroad company cannot relieve itself from responsibility to an employe for an injury resulting from its own negligence by any contract entered into for that purpose before the happening of the injury, and, if the contract under consideration is of that character, it must be held to be invalid. *But upon a careful examination it will be seen that it CONTAINS NO STIPULATION that the plaintiffs should not be at liberty to bring an action for damages in case he sustained an injury through the negligence of the defendant. He still had AS PERFECT A RIGHT TO SUE for his injury as though the contract had never been entered into. Before the contract was entered into, his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was GIVEN AN ELECTION either to receive the benefits stipulated for, OR to waive his rights to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would THEN determine whether he would accept the benefits secured by the contract, OR waive them and retain his right of action for damages. He knew, if he ACCEPTED the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury happened, TWO ALTERNATIVE modes were presented to him for obtaining COMPENSATION for such injury. With full opportunity to determine WHICH ALTERNATIVE WAS PREFERABLE, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him so to do. And it is not perceived why the court should relieve him from HIS ELECTION in order to enable him now to pursue his remedy by an action at law, and thus PRACTICALLY TO OBTAIN DOUBLE COMPENSATION for his injury. Nor does the fact that the*

fund was *in part* formed by his contributions to it, alter the case. The defendant *also contributed largely to the fund* under its agreement to make up deficits, to furnish surgical aid and attendance, to pay expenses of administration and management, and to become responsible for the safekeeping of the funds of the Relief Department. *It had a LARGE PECUNIARY INTEREST IN the very money which the plaintiff received.* We are not concerned with the question whether the plaintiff might not have secured a larger sum of money if he had prosecuted his legal remedy for the recovery of damages for his injury. *After the injury, the plaintiff was at liberty to COMPROMISE his right of action with the defendant for ANY valuable consideration, however small; and, if he CHOSE TO ACCEPT a less amount than that which he might have recovered by action, SUCH SETTLEMENT, if fairly entered into, CONSTITUTES A FULL ACCORD AND SATISFACTION, from which the court cannot, AND OUGHT NOT, to relieve him."*

In *Shaver v. Pennsylvania Co.*, 71 Fed., 931, the court in holding a statute which prohibited contracts of settlement by the acceptance of benefits like the contract in question void, say:

*"Under this plan, employes of railroads are afforded protection by a species of insurance. This sort of protection is not available to them in ordinary INSURANCE COMPANIES, except at such high cost as to make it SUBSTANTIALLY UNOBTAINABLE. Members sick or injured are entitled to benefits, REGARDLESS OF WHAT CAUSES their temporary disabilities. They will thus receive benefits in cases where no claim against the railroad company could be made. * * * Now, if employes desire to enjoy the benefits of such contracts, they should HAVE THE RIGHT TO MAKE THEM. They are capable of DECIDING FOR THEMSELVES whether they want to contract for such protection. It is not WITHIN THE POWER OF A LEGISLATURE to ASSUME that this class of men*

need paternal legislation, and that, THEREFORE THEY WILL PROTECT THEM by depriving them of the power to contract as other men may."

The court also held that the act of the Ohio legislature was unconstitutional, so far as it could be construed as forbidding the contract in question.

See the language of the court quoted *supra* on this point.

In *Hamilton v. St. L. K. & N. Y. R. R. Co.*, 118 Fed., 92, a demurrer was interposed to an answer in an action for personal injuries, setting up the receipt of benefits under a relief department contract similar to that of the C., B. & Q. Relief Department. The court in overruling the demurrer said:

"The contract in question does not limit the liability of the railroad company at all. On the contrary it ENLARGES THAT LIABILITY. It leaves to an employe injured while in its service, all the rights of action he ever had either at common law or by statute, to recover damages for any alleged negligence. After an injury has been sustained, the servant WITH FULL KNOWLEDGE OF ALL THE FACTS AND AFTER AN AMPLE OPPORTUNITY for counsel and advice may ELECT whether to resort to his legal action against the railroad company OR to avail himself of the provisions of the 'Relief Department.'

In many instances like that of sickness resulting from no act of negligence on the part of the railroad company, or like that of casualties occasioned by the necessary and inevitable peril of the employment, *the election is easy*. A remedy is afforded by the contract involved in the 'Relief Department' when none is available at law. In certain cases where liability at law is improbable *the election is not difficult*. In other cases where liability is *uncertain*, depending upon the accuracy of observation and memory of witness, *the election is more difficult, but none the less AVAILABLE to the party injured. In such cases TWO remedies are open to him, ONE CERTAIN AND*

IMMEDIATE found in the provisions of the 'Relief Department,' THE OTHER UNCERTAIN AND DISTANT, found in an action at law.

The contract in question neither CONSTRAINS HIM TO FOREGO his legal action NOR does it IN ANY MANNER LESSEN THE AMOUNT OF RECOVERY OR LIMIT THE LIABILITY of the defendant in case HE ELECTS to resort to the courts for redress."

In a recent case—*Atlantic Coast Line R. Co. v. Dunning*, 166 Fed., 850—decided in November, 1908, by the Court of Appeals of the Fourth Circuit, Chief Justice Fuller sitting as one of the court, the defense of the acceptance of benefits by an employe, a member of the relief department, under a like rule of the department, was sustained.

The court in an opinion by Morris, J., concurred in by Chief Justice Fuller, summed up the law as settled by the many decisions, as follows:

"By a great number of carefully considered adjudications of the courts, both state and federal, contracts of this character have been upheld, and determined not to be against a sound public policy, but *distinctly BENEFICIAL to the employe* as well as wise on the part of the employer."

The court then cited a large number of cases, including those cited and quoted from *supra*, and said, in conclusion:

"We take it that it must be accepted that the contract is *a beneficial one to the employe*, and not against sound public policy."

In a still later case—*Day v. Atlantic Coast Line R. Co.*, 179 Fed., 26—decided by the Court of Appeals of the Fourth Circuit in April, 1910, the same ruling was made. The court say:

"The question of the validity of the contract, or contracts, in all respects similar to the one before us, has been so fully discussed by the courts, both state and federal, *and so uniformly upheld*,

that nothing new is open to be said. It has been expressly decided by this court. In *A. C. L. R. Co. v. Dunning*, 166 Fed., 850, 94 C. C. A., 128, in a well-considered and amply-sustained opinion by Judge Morris, in which Mr. Chief Justice Fuller concurred, the same contract relied upon by defendant herein was upheld. The learned judge says:

'By a great number of carefully considered adjudications of the courts, both state and federal, contracts of this character have been upheld and determined not to be against a sound public policy, but DISTINCTLY BENEFICIAL to the employe, as well as wise on the part of the employer.'

He cites a large number of cases sustaining his opinion. It is not necessary that we do more than refer to the volume of the Federal Reporter in which the case is reported. The basis upon which all of the decisions rest is that, *by becoming a member of the Relief Department, the employe does not waive, or contract against, liability for damages for an injury sustained by the negligence of the employer. That, after sustaining the injury, he is free to maintain an action for damages without regard to his being a member of the department. That he is entitled to the benefits secured by membership without regard to negligence or legal liability of the employer. That when he elects to take such benefits he releases, and NOT UNTIL THEN, the employer from other or further liability. With an evident and frequently expressed determination to strictly construe all contracts made by employes of public service corporations, or those in whose service the employment involves unusual hazard, waiving any rights, the courts have, with practical uniformity, and by the same process of reasoning, upheld this plan or scheme, adopted by railroad companies, and, so far as we are informed, concurred in by their employes.'*"

IV. The statute cannot be sustained as an authorized exercise of the police power on the ground that it was passed for the protection of labor, and by reason of a supposed inequality of advantage between the employer and its employees.

This ground for sustaining the act, is the main ground relied on in the opinion of the court below. (Rec., 70-74; 131 Iowa, 360-366.)

The court below, in stating this ground and its reasons in support of it, say:

"The *relations between employer and employe* are and always have been recognized as proper subjects of police regulation. * * * Employer and employe *do not stand in the same relative position* which they occupied before the various lines of industry became concentrated in comparatively few hands." (Rec., 70.)

After referring to different laws that have been passed, which, it is said, "recognize the propriety, if not the necessity of laws *for the protection and promotion of the interest of labor*," such as laws providing for preference of claims for laborers' liens, compulsory payment of wages at frequent or regular intervals, limiting the hours of labor, etc., the court say further:

"After a thorough examination of the cases we are satisfied that the present current of authority tends to uphold all *reasonable provisions for the protection of labor* and that Code Section 2071 is fairly within the scope of the powers of the state. * * * Generally speaking all law is made to protect man against undue advantage at the hands of other men and the chief justification for legislation upon matters of personal and property right is the fact that men *do not and cannot always deal on equal footing*. Under no circumstances is this *inequality* more frequent than in the relations *between employer*

and employe under modern conditions. Indeed in this inequality of advantage is found the only justification for any of the labor laws to which we have referred." (Rec., 71.)

The court, after citing and quoting from different cases, say further:

"It is with this condition in view that the legislature has enacted the statute under consideration *for the purpose of preserving as near as possible that equality of advantage to both parties* which is essential to the general good, and, as is well said in the Harbison case, *supra*, 'this alone commends the act as a valid police regulation.' " (Rec., 74.)

The court, in the immediately preceding part of the opinion, also uses the following language, in connection with which the foregoing should be read, as further illustrating the reasoning of the opinion on the particular point:

"*The immediate aid which the relief department offers MAY under such circumstances assume an exaggerated importance in his eyes, and in his weakness and distress lead him to accept a benefit inferior to that which he might otherwise be entitled to recover.* Moreover the legislature may well have believed that while membership in the relief department was *entirely voluntary* in the legal sense of the word it was still possible for the employer *by making the tenure of service more secure to those who became members to bring to bear an influence in that direction savoring of moral coercion.* * * * Conceding that it is beyond the power of the state to take from the employer the right to discharge his employe, or from the employe the equal right to leave the service of his employer with or without cause, subject of course to any legitimate claim for damages for violation of contract, it is none the less true that the state may still properly provide that no contract into which the employer invites his employe *under the express*

or implied threat that HIS REFUSAL will mark him as the first to be discharged from employment, shall be of any avail as a defense to an action for the enforcement of a statutory liability created for his benefit." (Rec., 69-70.)

As to this ground for supporting the act as a proper exercise of the police power and the reasoning on which it is based in the opinion of the court below, we say:

(1) One answer to this position of the Supreme Court of Iowa is that there is no basis for assuming that the legislature in passing the act had in mind any of these considerations. On the contrary, the act itself and the circumstances under which it was passed, negative any such supposed purpose or motive.

As we have already seen, the prohibition of the act in question that "any contract of benefit," etc., or "the acceptance of any such benefit" shall not "constitute any bar or defense," is expressly limited to "any cause of action brought under the provisions of this section,"—Section 2071.

The effect of this amendment therefore in connection with the previous decisions of the Supreme Court of Iowa, was, as we have shown, *supra*, to leave all such benefit contracts, and the contracts of release which under these decisions were made by the acceptance of benefits under them, valid and enforceable as to *all* causes of action they might have against the companies for injuries *except the particular causes of action on which suit was "brought under this section."*

The effect of this was that, *as to all the large class of employes whose ordinary duties were not connected with the actual operation of the railroad, ANY*

cause of action against the railroad company because of injuries *would be subject to the contract and release provision*, unless it happened that the particular injury occurred when they were engaged in the performance of some duty outside of their regular employment which was connected with the operation of the railroad. And then, too, only in case the injury was caused by the negligence of an employe in the operation of the railroad—the movement of the engines and trains, etc.

The result was that if a car repairer employed by the plaintiff in error and a member of its relief department should be injured while at work on a car on the main track by the negligence of the engineer of the train, to which the car was attached, in starting the train, he would not be bound by the release provision of his Relief Department contract.

If, however, he was injured in the company's repair shops, under the ruling in the Donald and Maine cases, the relief contract could be enforced against him according to its terms and the acceptance by him of benefits under it would constitute a release of the company's liability for damages for the injury.

Clearly, if the contract is unfair and oppressive in the one case, it is equally so in the other.

The assumption that the purpose of the legislature in passing the act was "for the protection of labor," by protecting the employe against "inequality of advantage" and "of preserving as near as possible that equality of advantage to both parties which is essential to the general good," is thus negated by the act itself.

Nor does the statute purport to prohibit the making of such contracts of benefit or the contracts of settlement by the acceptance of benefits under them

by any employe of any corporation, whether a railroad corporation or any other. Nor does it prohibit pleading them in bar of any liability of the company to the employe *except the particular liabilities defined and specified in the particular section.*

Under the terms of the provision itself, such a contract entered into by any employe would be entirely valid and enforceable as such, as a bar to a liability of the company for the neglect or wilful acts of its employes, *except in the particular cases provided for in the act*—"causes of action brought under" the particular act to which it was an amendment.

As to *all* employes of the company, it is perfectly valid as a bar to any liability of the company, whether for negligent or wilful acts, except in these particular cases.

This fact alone, that the contract was valid and enforceable as against any employe entering into it as to *all* liabilities, *except the particular liabilities provided for in the statute* to which it was an amendment, and could be set up in bar of those liabilities, shows conclusively that the act was not based on any supposed *inequality* between the employer and the employe, and the consequent supposed advantage which the employer had.

If there was any "inequality of advantage" in entering into the original contract of benefit—the contract of membership—it would apply as well to *all* employes of the railroad corporation—to the car repairer in the car shops or the many other employes whose ordinary duties were not connected with the "operation of the railroad" as to a conductor or engineer of a train whose ordinary duties were connected with such operation.

If there was any "inequality of advantage" in an

acceptance of the benefits after the injury occurred, it would have applied equally to an acceptance of benefits after the injury had occurred, where the injury was the result of negligent or wilful acts, in some other branch of the service than that of the movement of trains.

If it had been in the mind of the legislature in passing the act, to protect labor for the reason that an employe of a railroad company in entering into such a contract of indemnity or in accepting the benefits under it, with the election which the contract preserved to him, was—to use the language of the opinion—“*under the express or implied threat that his refusal would mark him as the first to be discharged from employment,*” this reason for the passage of the act would have applied equally to *all* such contracts of indemnity by *any* employe, as to *all* liabilities of the company to the employe.

If, in case an employe is “severely injured, the pain from his wounds,” etc., “*are not conducive to calm and businesslike reflection,*” and the “*immediate aid* which the relief department offers may under such circumstances *assume an exaggerated importance*” and “*lead him to accept*” the benefit, this would be equally so as to *all* employes without reference to the branch of the service in which they were employed or whether the injury resulted from the negligence of an engineer or some other employe.

(2) It will be seen that the act does not provide merely that “*any contract of relief, benefit or indemnity,*” etc., shall not constitute a bar or defense, but it also provides that “*the ACCEPTANCE OF any such relief, insurance, benefit or indemnity by the person injured*” shall not “constitute any bar or defense.”

As we have seen, it is not the "contract of insurance, relief, benefit or indemnity"—the contract of membership—which constitutes the release—the accord and satisfaction,—that is set up in bar in the case before the court.

It is the contract of release—the accord and satisfaction—which, under the previous express decisions of the Supreme Court of Iowa, and the other cases cited, *results from the acceptance of the benefits after the injury has occurred.*

That this contract of settlement thus made by the act of the acceptance of benefits after the injury occurred, was a complete accord and satisfaction, unless the act in question, which prohibits such releases and makes them void, is held valid, is indisputable.

It is therefore the prohibition of the statute, "*nor shall the acceptance of any such relief, insurance, benefit or indemnity*" constitute a bar, that avoids the contract of settlement, and for that reason it is only this provision that is material to the defense set up.

And all that was said by the court below as to the supposed "inequality of advantage" between the employer and employe at the time the contract of membership was entered into, is therefore in any view wholly immaterial to the real question, whether the prohibition of the contract of release *by the acceptance of benefits*, was an authorized exercise of the police power.

The fact that there was this relation of employer and employe *at the time the employe became a member*, or until the injury occurred and even after, is *wholly immaterial* to the defense in question, for the reason that it in no way evidences the supposed in-

equality of advantage *at the time of the ACTUAL TRANSACTION which constitutes the release*,—the acceptance of the benefits with the opportunity to elect whether to accept or reject them *after the injury occurred*.

This is conclusively shown by the fact that if immediately or shortly after the injury, but *before the acceptance of the benefits*,—to make his claim to which the employe was given by the regulations sixty days after the injury (Rec., 24)—the person injured and having the claim of liability, *should cease to be an employe*—either by his voluntary withdrawal from the service, or his discharge by the employer—he would still clearly have the same right TO ELECT to demand the benefits, OR if he chose to do so, to sue the company to recover the full amount claimed.

This fact alone shows that this statute, so far as its prohibition affects a contract of settlement such as that in question in the case before the court, was not and could not be based on any supposed *inequality between the employer and its employe* at the time of the transaction.

(3) To justify an act of the legislature as a proper exercise of the police power, the court must be satisfied that there was reasonable ground for assuming that the supposed evil which it was intended to remedy in fact existed.

See cases cited, *supra*, pp. 46-50.

For this reason, even in cases where the purpose as declared by the legislature itself in the very act was to remedy a particular supposed evil, the court has looked behind the act and if it found that there was no reasonable basis in the known facts for the assumption that the evil existed has declared the act void.

In the case before the court, there is no basis in

fact for any assumption by the legislature as a justification for the act, that in the case of the defendant's relief department, "while membership in the relief department was entirely voluntary in the legal sense of the word," "the employer by making the tenure of service *more secure* to those who became members," had brought to bear or would bring to bear "an influence in that direction *savoring of moral coercion.*"

Nor is there any basis in fact for any assumption that the employes of the defendant were invited to enter into the particular contract of benefit "under the *express or implied threat* that his refusal will mark him as the first to be discharged from employment."

On the contrary, the express averments of the answer, admitted by the demurrer, that the contracts of membership with the relief department are voluntary, and that the employe has a right to withdraw from membership at any time, negative any such assumption. (Rec., 6.)

In the previous case of *Donald v. Railway Co.*, 93 Iowa, 284, decided before the statute was passed, the same court, with the same facts before it, said:

"The department is *purely voluntary* as to its membership and none other than employes of the defendant company are eligible to membership.

* * * The basis of membership is a written application showing the moral and physical qualifications essential. Employment in the company *in no way depends upon membership* in the Relief Department."

Manifestly, there can be no inference of any such "influence savoring of moral coercion" on the part of the defendant company, or of any such "express or implied threat" simply because the legis-

lature *passed the act*, and it *may* be inferred that such was the *possible* reason the legislature had for passing it.

Much less can this be so where, as we have seen, the act itself by its terms limits its provisions to particular employes and to particular classes of liabilities for injury, and thus negatives any such inference as to the *possible* reason or motive for the passage of the act.

(4) The prohibition of the act is limited, as we have seen, to one class of corporations and to one class of claims of liability against such corporations—claims of recovery for injuries resulting from negligent or wilful acts (1) in the operation of the railroad (2) to employes engaged in the particular service connected with its operation.

In what respect does this class of liabilities, *after the injury has been inflicted and the cause of action has accrued*, differ from any other claim of liability because of negligent or wilful acts, whether of the same corporation or of any other corporation? Why should a different method of settlement and adjustment of this class of claims be required?

This class of claims, like the others, must be disposed of by voluntary settlement or litigation. All other claims must be settled in the same way. To settle these claims by amicable adjustment means by contract.

To deny to a railroad company the right to make a contract for the settlement of such claims, is to deny to it the right of private contract. To deny to the employes of the railroad companies the right to make such a contract, is to deny to such employes the right of private contract.

As often said by eminent courts, if there is one thing more than another that public policy requires, it is that men of full age and understanding should have the utmost liberty of making such contracts as they wish.

The defendant in error seeks to sustain this legislative fiat—that defendant and the great army of its employes cannot maintain their relief department with the regulation in question, which has been found mutually satisfactory since its establishment in 1889, and that this paternalistic interference with their right to contract is sustainable—on the ground that the employes who become members are not on an equal footing with the company in making the contract, but are, in effect, coerced into making the contract.

No such imputation on the good faith of the company or the intelligence and independence of its employes, has the slightest support in the record, and it is, in fact, as we have seen, negatived by the very act itself, which, in effect, recognizes the validity and binding force of all such contracts, except as to the particular liabilities specified in the act to which it was an amendment.

If, in a particular case, the pleadings and evidence should show that an employe had joined the relief department under an unlawful constraint, or that he was excusably ignorant of the terms of the regulations, the court would in a proper case relieve against such or similar wrongs, and the legislature could stop any such evils, if they existed, by appropriate legislation. But here is a contract in itself lawful, which is not contrary to any interest of the public, but beneficial and to be commended, as the courts have repeatedly said.

Can the company and its employes be absolutely deprived of the right to make such a contract, no matter how freely and fairly it is entered into?

It is not within the power of any legislature under a free government to take away from a large class of men and corporations the right to contract as other men may, on the assumption that this class of men need protection in the circumstances under which they may make a lawful contract.

V. The act cannot be sustained as a valid exercise of the police power on any of the grounds so fully stated in the opinion of the Supreme Court of Iowa (Rec., 68-82; 131 Ia., 357-378), and which presumably are the grounds relied on as sustaining it in this court.

The court states at length five different alleged reasons on which it bases its conclusion that the act can be "justified by reference to the police power."

The statement of these reasons—some of which, as we shall show, are mere repetitions in another form of others—covers twenty pages of the opinion.

In view of the fact that the court states that the questions raised "have been thoroughly and exhaustively presented in the briefs of counsel" (Rec., 62), and of the further fact that the same attorneys who appeared for the defendant in error in the court below, also appear for him in this court, it is fair to assume that the grounds thus stated are also the grounds which will be relied on in this court.

We will consider these different grounds in the order in which they are stated in the opinion.

1. *The act cannot be sustained, as a proper exercise*

of the police power, on the first ground stated in the opinion—that the original act to which the act in question was an amendment, “created” a right “which did not before exist,” and that as to any such right the legislature had inherent power, “in its discretion,” to pass any act to protect the right it saw fit. (Rec., 68-70; 131 Ia., 357-360.)

The court say:

“It should be kept in view at all stages of this discussion that the enactment, the validity of which is denied by the appellee, is an attempt by the legislature to protect a right which Code section 2071, in its original form, conferred upon railway employees; and we think it a rule, the soundness of which cannot be successfully denied, that where the legislature, acting within its constitutional power, provides a right or confers a benefit which did not before exist, it may, in its discretion, also provide that no contract by which that right or benefit may be waived, lost or impaired shall be of any validity whatever.” (Rec., 68.)

The court, after referring to supposed instances of the exercise of a similar power, as in the case of homestead rights, etc., say:

“In our judgment the amendment of 1898 was a legitimate exercise of the inherent power of the legislature to protect the right which it HAD CREATED.” (Rec., 68.)

The same reasoning in support of the validity of the act is stated in different forms in other parts of the opinion. (See Rec., 69, 81 and 85.)

(1) The reasoning of the opinion on this point, as we have seen, is that the original act of which the act in question was an amendment, “created” a right which “did not before exist” and that as to any such right the legislature had inherent power

"in its discretion" to pass any act to protect the right it saw fit.

On reference to a preceding part of the opinion (Rec., 60) it will be seen that the particular "right" referred to in the part of the opinion under consideration as "conferred upon railroad employes" which "did not before exist" was the right to recover for negligence in cases in which the fellow-servant rule applied, and in which for that reason there could be no recovery at common law.

The court there say:

"Code Section 2071 as first enacted, making railway companies *liable for injuries occasioned to a servant by the negligence of a fellow-servant* gave to the employes in that service *an important right* or measure of protection which *did not before exist.*"

On reference to the statute referred to—Section 2071—(*supra*, p. 14), it will be seen that it gave a right of action to "*any person, including the employes of such corporation,*" in consequence of either (1) the neglect, (2) or mismanagement, or (3) wilful wrongs, of the corporation, "*in any manner connected with the use and operation of any railway.*"

This statute clearly "abrogated the common law" "so far as applicable to the cases covered by it" (*Hamilton v. Schoenberger*, 47 Ia., at 387), and any liability arising after its enactment because of acts done contrary to its provisions, *whether there was a corresponding right of action at common law or not* would therefore be a liability "created by" the statute.

As to substantially all the liabilities thus "created" by it, there was a corresponding liability at common law except the particular liabilities to em-

ployes in *the particular cases in which the fellow servant rule applied.*

The entire reasoning of the part of the opinion under consideration is, as we have seen, based on the fact that because the legislature had by this statute "created" a "right" "*which did not before exist*" it had the power "in its discretion" to protect that "right" by any legislation it saw fit to enact for this purpose.

And if the reasoning has any force, it necessarily assumes—at least for the purpose of the particular ground for sustaining the act in question—that as to all other rights or liabilities which *did* "before exist" whether "created" by the original statute or not, and to which therefore the reasoning would not apply, the legislature had no such power.

The reasoning of the opinion, if it has any force, therefore assumes that as to all the liabilities to employes for neglect or wilful wrongs defined and fixed by this statute, *except those in which there was no corresponding liability at common law, for the reason that the fellow-servant rule applied to them*, the legislature would be powerless to limit the freedom of contract for the same reason that a like liability—the liability at common law—"before existed."

As to the one liability to employes, however, which the legislature, in revising the law on the subject and embodying it in this provision in statutory form, saw fit to add to those which "before existed," the legislature would have the power "in its discretion" to protect the "right" by prohibiting the particular contracts of release in question, and by force of the same reasoning, *to prohibit any contract whatever*—whether of release or otherwise—

which it saw fit to prohibit, even after the liability had become fixed and was therefore the individual property of the employe.

That there is no sound basis either in reason or authority for any such supposed distinction we expect to show.

(2) While we deny that there is any such supposed distinction, as to the power of the legislature to prohibit the exercise of the power to contract, as to liabilities based on a statute "which did not before exist," and as to liabilities which did "before exist"—a conclusive answer to this asserted ground for sustaining the act is that the act itself shows that it was not passed in the exercise of any such supposed "inherent" power in the legislature to "protect" a right "created" by it "*which did not before exist.*"

While, as we have already shown *supra*, the legislature did include in the statute, of which the act in question was an amendment—section 2071—a liability *which did not exist at common law*—the liability for negligence in cases in which the fellow-servant rule applied—it *also* included in it by the same general language the large class of liabilities to employes for which *there was a corresponding liability at common law*, and which were *not* therefore liabilities "created" by the statute "*which did not before exist.*"

The amendment to this act, the validity of which is in question, extended in terms to "*any cause of action brought under the provisions of this section,*" and therefore equally to both classes of liabilities, and it follows that its declared purpose as shown by the express language of the act itself was to pro-

tect *all* of these liabilities equally by the same prohibition.

In fact the very ruling of the court that the act must be sustained, if at all, as an exercise of the police power (see *supra*, p. 45) is wholly inconsistent with the theory that it was passed in the exercise of this supposed unlimited power of the legislature,—to limit or prohibit “in its discretion.”

And this, for the reason that the police power is in its nature, a wholly different power—a power subject to well-defined and recognized limitations, and not a power to pass laws “to protect” a right “created” by it “in its discretion” arising from the fact that the right which was “created” by it “did not before exist.”

(3) In addition to the fact that, as we contend, there is no basis in law for any such supposed distinction, there is the further fact that the logical effect of this supposed distinction if it means anything would be that, as to a very large part of the liabilities covered by the one provision, the prohibition of the statute would be void.

As we have seen, the cause of action was given by the original statute to which the act to question was an amendment, by the same general language, in *all* cases,—both those in which there was a corresponding liability at common law and those in which, because of the fellow servant rule, there was no such liability. On the other hand, the prohibition of the statute applies in terms to “*any* cause of action brought under the provisions of this section,” and therefore applies equally to both.

It follows on the reasoning of the opinion that as to all of those causes of action provided for by the

statute, but which "did" "before exist," and which were not therefore within the rule laid down by the opinion as sustaining the prohibition as a valid exercise of the legislative power, this prohibition of the statute was unconstitutional and void.

It follows, also, under the well settled law as defined and applied by many express decisions of this court, that the unconstitutional prohibition which is part of the one general provision included in the same general language, "*any cause of action brought under the provisions of this section*," and therefore not separable—being void, the entire provision should be held void.

Poindexter v. Greenhow, 114 U. S., 270.

Baldwin v. Franks, 120 U. S., 678.

Pollock v. Farmers Loan & Trust Co., 158 U. S., 601.

United States v. Ju Toy, 198 U. S., 253, 262.

Employers' Liability Cases, 207 U. S., 463.

Smith v. Peterson, 123 Iowa, 672.

Layman v. Telephone Co., 123 Iowa, 591.

(4) The supposed rule of law on which the court bases this particular ground for sustaining the act, is thus stated in the opinion (Rec., 68):

"We think it a rule the soundness of which cannot be successfully denied, that where the legislature, acting within its constitutional power, provides a right or confers a benefit which did not before exist, it may in its discretion also provide that no contract by which that right or benefit may be waived, lost or impaired shall be of any validity whatever."

In support of this supposed rule, the court refers to "homestead exemptions" and "exemptions to debtors from execution" as "instances" of rights thus protected.

As to these instances it says, "The authorities upon this and kindred propositions are too numerous and familiar to require citation," and so cites none. But further on in the opinion (Rec., 77), is the following:

"*Statutes* have been sustained which *invalidate* contracts to waive homestead and exemption laws.

Curtis v. O'Brien, 20 Iowa, 376.

Knette v. Newcomb, 22 Ind., 348 (in fact

Kneette v. Newcomb, 22 N. Y., 249).

Maloney v. Newton, 85 Ind., 565."

On reference, however, to these cases, it will be seen that no one of them gives any support to the proposition which they are cited as sustaining. In no one of them was any question as to *the validity of a statute* invalidating contracts to waive rights under homestead or exemption laws, or in fact of any statute whatever, involved or considered.

The only question as to the validity of contracts to waive homestead or exemption laws decided in these three cases, was the question whether such a contract in advance—as in a note given for a debt—was void on the ground that it was contrary to public policy, and the court held that it was—precisely as the courts have held that an agreement by an employe in advance to waive or release any claim of liability for negligence before the liability accrues, is contrary to public policy and therefore void.

These cases therefore not only do not support the proposition they are cited as sustaining, but have no possible application to the case before the court.

Nor do any of the other authorities cited in the opinion establish any such supposed "rule" as that

stated in the opinion and we know of no authorities that do.

(5) It will be seen that the statutory amendment in question does not purport to affect in any way the liability created by the original statute, to which it was an amendment, either to enlarge or in any way modify it.

The admitted and sole purpose of the amendatory act was to prohibit the exercise of the power *to contract for the settlement of* the liability fixed and defined by the original statute, by acts done *after the liability had become fixed*—by the election to accept the benefits on the only terms on which they were offered—that their acceptance should be in full discharge of any further claim to recover compensation for the injury—which the Supreme Court of Iowa in its two previous decisions had held was an accord and satisfaction of the liability *by contract of the parties*.

No authorities are cited by the court, and we know of none, which give support to any such supposed distinction, as to the power of the legislature to interfere with the freedom of contract for the settlement of a liability, by prohibitive legislation, between contracts for the settlement of a liability which gives a right of action to an individual *because of some rule of the common law*, and contracts for the settlement of a liability which gives a right of action *because of a statute* fixing and defining the liability.

Much less is there any basis in reason or authority for any such supposed distinction as to the power of the legislature to take away the power to contract as to a liability after it has arisen, between liabilities created by a statute *for which there was no corresponding liability at common law*, and liabilities cre-

ated by the same statute *for which there was such a corresponding liability.*

When the liability once attaches, it is as much the property of the individual in whose favor it has arisen, with the same right to contract with reference to it in the one case as in the other—whether it arises from a statute defining the rule of liability or a rule of the common law defining it.

The Supreme Court of Iowa had before expressly held in the two cases cited, *supra*, that as to the liabilities created by this statute the employe and employer had the power to make the very contracts for the release of the liability after it arose, by the act of electing to take the benefits on the terms offered.

If the individual has a freedom of contract with reference to the one class of liabilities, he has the same freedom of contract with reference to the other.

That there is no basis in law or reason for any such supposed distinction is clear, when the necessary result of establishing it is considered.

It is always within the power of the legislature to modify or repeal the common law as to any right of action or liability, and to substitute for it statutory provisions covering the subject. This is frequently done as to existing rules of common law liability, either for the purpose of making clear the rule of liability, and putting it beyond the pale of change by decision, or modifying it to some extent by expressing it in statutory form.

In fact, in some states substantially the entire body of the law defining rights and liabilities is in the form of statutes.

Thus in Georgia, Alabama and California, and other Code states, a large part of the common law

has been abrogated by statutory provisions and a code of laws fixing the rules as to rights and liabilities, has been adopted. And in Louisiana substantially the entire body of the law is the civil code enacted in statutory form.

In all these states the rights and liabilities fixed and defined by the statutes are "created" by the statute in the same sense in which the liabilities fixed and defined by the code provision in question were "created" by statute, whatever liabilities there were at common law.

As to the liabilities as to which there was a corresponding liability at common law, the enactment of the statute covering the subject-matter abrogated the common law. (*Hamilton v. Schoenberger*, 47 Ia., at 387.) And as a consequence, these liabilities were "created" by the statute in the same way in legal effect as the other liabilities fixed and determined by it, and included within the same general language.

In all such cases all liabilities which arise after the passage of the statute—whether there were corresponding liabilities at common law or not—are "created" by the statute in the same sense in legal effect, and it follows, on the reasoning of the opinion of the Supreme Court of Iowa, that as the liability was "created" by statute, the legislature which created it would have power "in its discretion" to pass any law it saw fit for the purpose of "protecting" this liability, and therefore *could prohibit all contracts which might be made for its release or otherwise, after it arose.*

In fact, whether a right of action at law to enforce a legal liability is based on a statute or a rule of the common law, the right or liability is only "created"

by the statute or the common law in the sense that the statute or the rule of common law defines the conditions which, if they exist, will create the liability or right.

If the liability is a liability for negligent or wilful acts, the liability itself arises because of the negligent or wilful acts of the person or corporation which are made actionable, and when it arises it belongs to the individual, and he has the same freedom of contract as to it, whether it is based on a rule of the common law or a statutory provision. If the legislature passes an act prohibiting the making of a particular contract with reference to the right or liability, after it thus accrues and belongs to the individual—whether evidenced by an express contract of release or voluntary acts which, under the facts, are equivalent to such a contract—the act necessarily interferes as much with the freedom of contract in the one case as in the other.

If this were not so, the necessary effect would be that in those states where the rules which fix rights and liabilities are defined, as a whole, or in large part, by statute as distinguished from the common law, as in Georgia, Alabama, California and other code states, the freedom of contract of the individual would be at the mercy of the legislature and the prohibition of the Fourteenth Amendment would be meaningless.

So by force of the same supposed distinction, to the extent that the legislature in particular states might repeal the common law from time to time and substitute for it statutes defining the rules of right and liability, the rights and liabilities thereafter accruing would be subject to such limitations or prohibitions as to the freedom of contract with reference to

them as the legislature might in its unlimited "discretion" enact.

2. *The act cannot be sustained, as an exercise of the police power, on the second ground stated in the opinion—that it is a regulation of the relations between employer and employe, based on the fact that they do not stand on an equal footing with respect to the subject-matter of the legislation, and designed to remedy this inequality.* (Rec., 70-74; 131 Ia., 360-366.)

This ground has been already fully considered. See *supra*, pp. 76-87.

3. *The act cannot be sustained, as an exercise of the police power, on the third ground stated in the opinion—that there is a "fundamental and ineradicable distinction" between the "inalienable rights" of "a natural person and those of a corporation," that as to these "inalienable rights" of the natural person "he is born to them," but that a corporation "has no rights except those with which it is endowed by the law-making power, and the power of creation necessarily implies the power of regulation."* (Rec., 74-75; 131 Ia., 366-367.)

(1) If this supposed distinction between corporations and natural persons has any bearing as a ground for sustaining the act, it must be—as it is stated in the opinion—as a separate and independent ground in itself and not as an additional reason in support of either of the two grounds previously stated, which we have already considered.

As to the first of these grounds—that the legislature had the power to pass the act for the reason that it was passed for the protection of a right or liability "created" by the original act, which "did

not before exist"—it is clear that if the legislature had any such power it would apply equally by force of the same reasoning to *any* such supposed right or liability—whether those affected by it were natural persons or corporations.

So as to the second ground stated in the opinion—that the statute was passed for the protection of labor and because of a supposed inequality between the employer and employe, etc.—if the act can not be sustained on this ground as to natural persons in the same situation, it cannot be as to corporations, merely because they are corporations.

It follows, therefore, that if this third ground stated in the opinion in support of the court's conclusion has any force, it must be as an additional and independent ground in itself for sustaining the act as a valid exercise of the police power.

In this view, the argument on which it is based comes to this manifestly untenable one—that an act of the legislature which applies only to corporations may be sustained as a valid legislative act because of the fact that they are *corporations*, as distinguished from *natural persons*, for the reason that (to use the language of the court), "a corporation has *no rights* except those with which *it is endowed by the law-making power* and the *power of creation* necessarily implies *the power of regulation*."

(2) There are certain recognized differences between natural persons and corporations, because of the fact that the one is a natural person and the other is a corporation created by the state, which in particular cases require different legislation as to each.

But the question which this court is dealing with in the case before it, relates wholly to the inalienable

rights which are protected and preserved by the Fourteenth Amendment.

That a corporation is a person within the meaning of this provision, and therefore entitled to the same protection as to all the inalienable rights it guarantees, as a natural person, has been many times decided by this court. And that such is the well settled law is expressly recognized in another part of the opinion of the court below (Rec., 63).

That these inalienable rights include both the right of freedom of contract and the right to the equal protection of the laws, and that as to both of these rights corporations and natural persons stand on the same footing and are equally within the language and protection of the amendment, has also been many times decided by this court.

See cases cited, *supra*, pp. 39-40.

These inalienable rights, including the right of freedom of contract and the right to the equal protection of the laws, are protected from infringement by state legislation, because the amendment guarantees them to all persons and therefore to corporations, in the same way as to individuals, and not because the persons referred to were "born to them."

As to the cases referred to as giving support to this supposed distinction, it is sufficient to say that they will be found, on examination, to fall within one of three classes, either (1) cases in which there was the reserved power of amendment and repeal, and the particular legislation was held to fall within that power, or (2) cases in which it was held that corporations are subject to the same power of regulation by the state as individuals, including the power to prevent an abuse of their corporate fran-

chises, and that as to such power of regulation they stand in no different relation to the state, or (3) cases in which it was held a state has power to impose any conditions it sees fit on the right of *foreign* corporations to do business in the state.

The following of the cases cited in the opinion fall within the first class:

Sinking Fund Cases, 99 U. S., 700.

N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 566.

Ry. Co. v. Paul, 173 U. S., 404.

Skinner v. Garnett Mining Co., 96 Fed., 745.

N. P. R. R. Co. v. M. C., etc., R. R. Co., 128 Fed., 230, 238.

Ry. Co. v. Paul, 64 Ark., 83.

Sioux City St. Ry. Co. v. Sioux City, 78 Ia., 742.

State v. Browne & Sharpe Mfg. Co., 18 R. I., 16.

The following of the cases cited fall within the second class:

Knoxville Coal & Iron Co. v. Harbison, 183 U. S., 13.

Dayton Coal & Iron Co. v. Barton, 183 U. S., 23.

A. T. & S. F. Ry. Co. v. Matthews, 174 U. S., 96.

Orient Insurance Co. v. Daggs, 172 U. S., 557.

Tullis v. L. E. & W. R. R. Co., 175 U. S., 348.

State v. Peel Splint Coal Co., 36 W. Va., 802.

Herrick v. Railway Co., 31 Minn., 11.

The following, the remaining case cited on the particular point, falls within the third class:

Hooper v. California, 155 U. S., 648.

That the first and second class of cases have no application is clear and that the third have not we shall show under our next point.

(3) In fact, this supposed distinction between natural persons and corporations, as to the power of regulation, has in any view no application to the defendant corporation, which as the opinion recognizes, is a corporation of another state than Iowa.

The ground for the supposed distinction is thus stated in the opinion:

"The corporate person has *no rights* except those with which it is endowed by the *law-making power*, and the *power of creation* necessarily implies the *power of regulation*."

Manifestly, even if it is assumed that this reasoning would have force as to a corporation of Iowa,—which we have shown it has not,—it has no application to a corporation of another state operating a railroad in Iowa.

Such a corporation derives its existence and all the corporate powers with which it is endowed not from the "law-making power" of Iowa, but from the "*law-making power*" of the state which created it, and its right to exercise in the State of Iowa the corporate powers granted it by its charter is derived from the law of comity in the absence of prohibitory legislation, and not from any act of the legislature of Iowa creating it.

As such corporations do not derive their existence and corporate powers from the "law-making power" of Iowa, and therefore the legislature of that state did not create them, the reasoning that

the "power of creation" "necessarily implies the power of regulation," has no possible application to them.

4. *The act cannot be sustained as an exercise of the police power on the fourth ground stated in the opinion—that the fact that the defendant is a corporation of another state "does not afford it any advantage."* (Rec., 75-76, 131 Ia., 369.)

This asserted ground for sustaining the act is not in fact in form or substance an additional ground.

On the contrary, it is only a statement by the court of its reason for holding that the fact that the defendant was a foreign corporation, and not a corporation of Iowa, was no reason why the ground last stated by it for its ruling that the act was a proper exercise of the police power—that "the power of creation necessarily implies the power of regulation"—did not apply to it.

We have already shown that this asserted ground for sustaining the act as an exercise of the police power, has in any view no application to foreign corporations, for the reason that they were not created by the law-making power of Iowa, and that therefore it cannot be said in any view as to them that "the power of *creation* necessarily *implies the power of regulation.*"

In addition to this it will be seen, that the act in question does not purport to be an act prescribing the terms or conditions on which foreign corporations can do business within the state. It does not purport to impose any such terms or conditions. It only purports to be, and only is, a general statute applicable alike to all corporations operating railroads in the state

—whether corporations of Iowa or corporations of other states. So far as it applies to foreign corporations, it necessarily assumes their right to do business in the state and only purports to be a general law limiting the power of corporations—whether corporations of Iowa or corporations of other states—and their employees to contract to release liabilities incurred under the particular statute to which the act was an amendment.

Again, the power to impose on foreign corporations conditions on their right to do business within a state is not a part of the police power of a state, but a wholly different power. It is not a power of regulation as to such corporations, but a power to impose any conditions the legislature sees fit to impose on their doing business within the state, and therefore if it sees fit to exclude them altogether.

There can be no pretense that the act in question was an attempted exercise of this power of imposing conditions on the right of foreign corporations to do business in the state. On the contrary, as we have shown *supra*, it is recognized in the opinion of the Supreme Court of Iowa that the act, if sustained at all, must be sustained as an exercise of the police power (Rec., 68), which is a power of *regulation*—and not of exclusion from the state—that extends alike to all corporations—whether domestic or foreign.

5. *The act cannot be sustained on the fifth ground stated in the opinion of the court—that “the weight of the better reasoned cases supports the conclusion at which we have arrived.”* (Rec., 76-80, 131 Ia., 370-375.)

In support of this statement, the court refers to the “cases already cited” and “the following addi-

tional precedents" as decisions "which indicate something of the extent to which the power to regulate and restrict the right of contract" "has been upheld."

Referring to these "additional precedents" the court say further:

"It is proper to suggest that the decision of the question before us does not require us to adopt all the conclusions reached in these cases or all of the reasoning on which they are based. They are in point, however, as illustrating the trend of judicial thought."

As to the cases "already cited" it is unnecessary to add to what we have already said.

As to the "additional precedents" cited, there are sixteen of these cases.

Of these sixteen cases, only three are decisions by this court.

The citation of the case of *Atkin v. Kansas*, 191 U. S., 207, from which the court quotes "*as a fitting conclusion to this examination of authorities*" and the manner of its citation illustrate the indiscriminate way in which the cases are cited as sustaining the court's conclusion.

The court, referring to this case, say that it is a case "sustaining an act making it unlawful for any contractor engaged in the work of public improvement to require or permit an employe to work more than eight hours per day."

The court then quotes some general expressions from the opinion which, when read in the light of the actual facts of the case, have no possible application to the case before the court.

On reference to the case itself it will be seen that the act, the validity of which was in question, was not sustained at all as an exercise of the police

power, but solely on the ground that it was limited to employes of *municipal* corporations, and the decision of the court sustaining it was based on the ground that because such employes were in fact and law employes of *the state itself*, the state through its legislature could pass such laws as it might see fit as to the terms and conditions of their employment.

As to the other two cases decided by this court, which are cited:

In the first—*Patterson v. Eudora*, 190 U. S., 169—the statute which was sustained was a statute regulating the manner of paying seamen's wages, and this court sustained the act on the ground that contracts for seamen's wages were exceptional in character, and that in view of the particular conditions of the employment, the statute was a proper exercise of the police power.

In the second of these cases—*Otis v. Parker*, 187 U. S., 606—the constitution of California provided that all contracts for the sale of shares of capital stock to be delivered in the future, should be void, and this court sustained the act on the ground that it was analogous to a usury law or a law forbidding lotteries, and a proper exercise of the police power to prevent gambling in stocks.

In both these cases, therefore, the statutes which were sustained, were wholly different from, and the reasons on which the decisions were based manifestly have no application to, the particular statute, the validity of which is in question in this case.

As to the other cases cited, in view of the fact that none of them are decisions by this court, and of the further fact that they are only cited as "illustrating the trend of judicial thought" on the subject, it is sufficient to say that they were all cases which in-

volved wholly different statutes and were based on reasons which in our view have no application to the act in question.

VI. Our contention that the act is an unauthorized interference with the freedom of contract, guaranteed by the Fourteenth Amendment, and for that reason void, is sustained by a number of adjudicated cases, in which similar legislative acts were held unconstitutional on that ground.

In *Cox v. Ry. Co.*, 1 Ohio N. P., 213, a suit for personal injuries, brought against the railroad company, by an employee who was a member of its Relief Department. One of the rules of the Department provided that the acceptance of benefits for any injury should operate as a release of any claim against the company, and it appeared that the plaintiff had accepted the benefits. It was contended for the plaintiff that his agreement that such acceptance should bar his claim against the company was invalid as prohibited by a statute of Ohio.

The court held that the agreement was not contrary to public policy, and that the statute relied on was unconstitutional—that it was in violation of Section 1 of Article 1 of the Ohio Bill of Rights, which, like the Fourteenth Amendment guaranteed the inalienable right of freedom of contract, providing that,

“All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring and possessing and protecting property and seeking and obtaining happiness and safety.”

The court said:

“The liberty of making contracts is absolutely

essential to the acquisition, possession and protection of property. Hence, if the statute under consideration contravenes this liberty, it must fall as certainly as though it was subversive of the citizen's right to more tangible or corporeal property.

It is well known that the legislature can exercise certain control over and regulate by proper laws railroad and other corporations having public duties to perform.

But this power is limited strictly to what is known as the police power of the state. * * *

Beyond these provisions (provisions passed in the exercise of the police power) the state *cannot interfere with the dealings and contracts of such companies with their employees*, who are *sui juris*, any further than it lawfully can with those of other employers of labor.

The police power of the state extends to matter only affecting the public welfare, the health, safety and morals of the community. *The Wheeling Bridge & Terminal Ry. Co. v. Gilmore*, 8 C. C. R., 658.

We must be careful, however, not to seek to sustain *paternal legislation* which is not within the limits of the constitution *on the claim that it is an exercise of the police power*.

In the present case, I am of the opinion that the portion of the statute applicable to this case, is clearly unconstitutional. *I am unable to see that the contract, which by the statute is declared void, IN ANY MANNER AFFECTS THE PUBLIC WELFARE, OR THE HEALTH OR MORALS OF THE COMMUNITY.*"

In *Farrow v. R. R. Co.*, 7 Ohio N. P., 606, the Ohio statute, before the court in *Ry. Co. v. Cox*, *supra*, was, on the authority of that case, held to be unconstitutional so far as it forbade contracts of the character considered in the foregoing cases.

In *Shaver v. Pennsylvania Co.*, 71 Fed. Rep., 931, a suit similar, in its material facts, to *Cox v. Ry. Co.*,

1 Ohio N. P., *supra*, the court held that the agreement that the acceptance of benefits should bar a suit for damages was not void as against public policy, but was valid, and that the statute before the court (which was the same statute as was involved in the *Cox* case) was void.

In passing on the public policy point, the court said:

“Now, if employes desire to enjoy the benefits of such contracts, *they should have the right to make them. They are capable of deciding for themselves whether they want to contract for such protection. It is not within the powers of a legislature to assume that this class of men need paternal legislation, and that, therefore, they will protect them by depriving them of the power to contract as other men may.*”

After discussing cases in other jurisdictions, bearing on the general question of the validity of such contracts, the court proceeded to consider the question of the constitutionality of the act.

The court first cited *Cox v. Ry. Co.*, 1 Oh. N. P., 213, *supra*, and referred to the section of the Ohio Constitution considered in the *Cox* case, and held that the statute violated the provision. It then referred to the provisions in the United States Constitution, including the Fourteenth Amendment, and proceeded as follows:

“As hereinbefore stated, this contract shows on its face, not only that no unfair advantage is taken of these employes, but that the contract, in its broadest and fullest sense, *is a beneficent one, intended for their protection and assistance.* If in some cases it proves unsatisfactory to the employe insured, that is in itself no evidence that the contract is of an unconscionable nature, or unfair in its provisions. *Neither is it a sufficient pretext to assume that all such contracts need the supervision of the legislative*

body, or that so large a class of citizens should be restricted in their right of personal liberty.

The Ohio statute, in denying to the employes of a railroad corporation the right to make their own contracts concerning their own labor, is depriving them of 'liberty' and of the right to exercise the privileges of manhood, 'without due process of law.'"

In *Sturgiss v. Atlantic Coast Line R. R. Co.*, 80 S. C., 167, the rules of the Relief Department contained a provision that if a member should sue for damages, he should forfeit his right to benefits, and the plaintiff, having elected to sue the company and recover a judgment against it, which was paid, contended that this provision was void under a certain statute of South Carolina.

The circuit judge, in an opinion which is referred to by the Court of Appeals of the Fourth Circuit (*Day v. Atlantic Coast Line R. R. Co.*, 179 Fed., 26) as "a very careful and learned opinion" and is printed in full in the report of the case (pp. 168-198), held that the contract, evidenced by the rule referred to, was not void on the ground of public policy, and that the statute in question was unconstitutional, both under the South Carolina Constitution and the Fourteenth Amendment.

After discussing at length the authorities holding that such contracts are beneficial to employes, and not against public policy, the Circuit Judge said:

"Since it is clear that the contract is not against public policy, the question is whether it can be prohibited by statute. If such statute can be shown to be a legitimate exercise of the police power, it will be upheld; if not, it must fall."

After referring to the authorities defining the po-

lice power, the Circuit Court, in holding that the statute in question was unconstitutional, said:

“Before a statute infringing on liberty to contract, which is one of the inalienable rights of man, can be sustained by the courts, it *must appear that such restraint of liberty is for the common public welfare, and equal protection and benefit of the people.* * * *

“Not only must statutes purporting to be enacted under the police power fall within the recognized objects of that power, but they *must have reference to matters of public as distinguished from private concern. In other words, it must appear that the interests of the public generally, rather than of a particular class, require such interference.*” (Citing cases.) * * *

“The statute here under consideration is not an act purporting to affect the public generally in the exercise of the police power, but *it is an act seeking to make a new contract between the parties.* It will not do to say that it is not contrary to public policy to maintain the Relief Department, letting it stand as a department, and yet so change it as to make it *wholly a contract for the benefit of the member and wholly against the interests of the company.* An effort thus to change the Relief Department so as to make it wholly in favor of the member, although the company contributes so largely in many ways to its support, is just as effectual a *prohibition of the Department contract as if made in express words; for nothing short of coercion could compel the company to maintain it under such circumstances, and such coercion would be nothing less than illegal confiscation of property.* * * *

I am utterly unable to see where the statute here under consideration has the remotest tendency to accomplish any such result; on the other hand, it appears to me to have just the opposite effect. The contract cannot be prohibited unless it be against the general public welfare, but *to the only portion of the public in-*

*terested both the courts and reason declare it is highly beneficial; hence the statute cannot be said to be a proper exercise of the police power, as the legislature cannot arbitrarily invade personal rights and declare beneficial contracts to be prohibited. No law prohibiting that which is harmless in itself or commanding that to be done which does not tend to promote the health, safety or welfare of society can be sustained. * * **

But freedom to enter into contracts that are in no way inimical to the public welfare is both a liberty and a property right secured alike to all persons, both natural and artificial, and cannot be encroached upon by the state in the guise of an exercise of the police power. It is an essential part of the rights of 'liberty' and 'property' guaranteed under the provisions of Section 5, Article 1, of the Constitution of the State of South Carolina, and Section 1 of Article XIV of the Amendments to the Constitution of the United States. *Under these guarantees any corporation given the right to own property possesses as an inseparable incident to that right the right to make all necessary and reasonable contracts for the management of that property. Likewise, any employe of such corporation has the right to make any contract beneficial to him so long as such contract is not opposed to public policy, and this right cannot be taken away by legislative action. * * **

In the light of these principles, escape is impossible from the conclusion that the act here under consideration is an illegal interference with the freedom of contract guaranteed by the Federal and State Constitution, and therefore null and void."

On appeal to the Supreme Court the judgment of the lower court was affirmed by a divided court.

In *Atlantic Coast Line R. R. Co. v. Dunning*, 166 Fed., 850, decided by the Circuit Court of Appeals of the Fourth Circuit in 1908 (Chief Justice Fuller sitting as one of the court), it was set up in defense to

a suit by an employe to recover for personal injuries, that he was a member of the Relief Department, that he had accepted the benefits under the rule requiring him to make an election, and that this was an accord and satisfaction.

It was contended by the plaintiff that this defense was prohibited and made void by the statute referred to in *Sturgiss v. Atlantic Coast Line R. R. Co.*, *supra*.

The Court of Appeals in an opinion by Morris, J., in which Chief Justice Fuller concurred, held that under the law of South Carolina as settled by the decision in *Sturgiss v. Atlanta Coast Line R. R. Co.*, *supra*, and the case of *Johnson v. Railway Co.*, 55 S. C., 152, referred to in the opinion, the plaintiff was barred from a recovery, notwithstanding the South Carolina statute prohibiting the defense.

The court say:

“The validity of similar legislation has been frequently the subject of judicial adjudication, and the courts have quite uniformly decided adversely to its validity.”

The court, after referring to and stating the decisions, by the circuit courts in *Sturgiss v. Atlantic Coast Line R. R. Co.* and *Johnson v. Railway Co.*, *supra*, and the affirmance of those decisions in the Supreme Court by a divided court, say:

“We think, therefore, we may take it to have been the law of South Carolina at the time the present case was tried, and, as far as we have any information, now is the law of South Carolina, that whenever an employe has after the accident elected to receive benefits as a member of the Relief Department, and has released the railroad company, he cannot maintain an action for damages notwithstanding the South Carolina act of assembly.

As by the common law the contract of the Relief Department with its members is valid, and

the act of South Carolina by her own courts is held to be inoperative to invalidate such a contract, we think the payment of the benefits and the release is a good defense in South Carolina.

* * *

We think the Circuit Court should have ruled that the acceptance by the plaintiffs of the benefits paid to them by the Relief Department was, under the facts proved by the defendant, and under the rulings of the South Carolina Courts with regard to the statute in question, a good defense to the action, and for that reason the judgment in each case is reversed."

In *P. C. C. & St. L. R. R. Co. v. Cox*, 55 Oh. St., 497, the Supreme Court of Ohio held that if the construction of the Ohio statute contended for in *Cox v. Ry. Co.*, 1 Ohio N. P., 213, quoted *supra*—that the intention of the statute was to prohibit and make void contracts such as the contract of settlement in question,—was adopted, it would make the act unconstitutional, and that, therefore, such construction should be avoided to give effect to the presumed intention of the legislature and, for that reason, it construed the statute as not prohibiting such contracts of settlement, but as only having reference to contracts to waive a right of recovery in cases of negligence.

The court said:

"To what sort of a contract does this language apply? It is to be assumed that the legislature intended to confine its action in forbidding the making of contracts upon subjects in themselves lawful, by persons *sui juris*, to such contracts, as are inimical to the state, that is, against public policy, for the right to contract is one not given by legislation, but inherent, necessarily involved in the ownership of property and as a primary prerogative of freedom, (2 Wharton on Contracts, Section 1061), and we should not construe

the words of an act so as to restrain this right, where the conflict with public policy is not clear, *unless the language will bear no other construction.* * * *

Taking the statute as a whole, the contract inhibited is a contract which, by its terms, waives the right of action on the part of the employee, while the *contract in question does not seek to waive the right of action, but expressly reserves it, and only gives to his election of remedies made after the injury, the effect of a waiver of the other remedy.* TO DENY SUCH A RIGHT WOULD BE TO DENY THE RIGHT TO SETTLE CONTROVERSIES. THE LAW FAVORS THE EXERCISE OF THIS RIGHT; IT DOES NOT DISAPPROVE IT."

In *Railway Co. v. Moore*, 152 Ind., 345, the validity of the release provision in the Pennsylvania Company's Relief Department contract (which was in substance the same as that involved in the case at bar), and of the settlement made by the acceptance of benefits under it, was involved.

The court held that neither the release provision, nor the settlement, was in conflict with a statute of Indiana which was relied on as invalidating them, on the ground that *if the statute was construed as prohibiting such contracts, it would be beyond the legislative power, as an interference with the inherent right of contract* and it therefore gave to it the construction it did.

The court say:

"But appellee contends that some of the cases cited above arose in states *having no similar statute*, and that the question of the railroad's contractual relief from liability was propounded as being against public policy, and not as in violation of a statute, and hence should not be accepted as authority. The answer to this is that *the statute also rests upon public impolicy*, or IT HAS NOTHING WHATEVER TO STAND UPON.

The right to contract upon subjects of them.

selves lawful, by persons *sui juris*, is beyond legislative control, so long as the right is exercised WITHOUT INJURY TO THE PUBLIC. The right to contract is inherent, and inseparably connected with the right to own and control property, and 'is a primary prerogative of freedom.' (2 Whart. Cont., Section 1061.) 'Therefore, in construing the act in question, it must be assumed that the legislature intended to prohibit *only such contracts as INJURIOUSLY AFFECTED THE PUBLIC*; and can it be said that a contract providing that *in the future*, when an injury may be suffered, the injured party *shall then be free to choose which of two remedies will be most useful to him and most to be preferred*, is against public policy? We do not see why, and are constrained to hold that the contract pleaded in the second answer is not within the inhibition of section 7087 Burns 1894, and that the same may be pleaded as a defense."

II.

THE STATUTE IN QUESTION IS IN VIOLATION OF THE PROVISION OF THE FOURTEENTH AMENDMENT THAT NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

The purpose of the statute, as we have already shown (*supra*, p. 45), was to prohibit the making of the contracts of release by the acceptance of benefits on the terms of the benefit contracts (1) with the particular corporations referred to, (2) by the employes who were within the terms of the act, (3) as to the particular liabilities defined in the act.

Our contention is that the attempted classification made by the act for the purpose of legislation was arbitrary and not based upon any reasonable ground of distinction, and that for that reason the act was a denial of the equal protection of the laws.

1. A classification for the purpose of legislation cannot be made arbitrarily, but must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is made.

This proposition is sustained, and its application illustrated, by the following cases decided by this court.

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,
165 U. S., 150, 155.

Duncan v. Missouri, 152 U. S., 377, 382.

Ry. Co. v. Smith, 173 U. S., 684, 696.

Cotting v. Stockyards Co., 183 U. S., 79.

Connolly v. Pipe Co., 184 U. S., 540.

Yick Wo v. Hopkins, 118 U. S., 356, 369.

In *Gulf, Colorado & S. F. Ry. Co. v. Ellis*, 165 U. S., 150, an act of the legislature of Texas provided that any person having a valid claim for personal services rendered or labor done, or for damages, etc., against any railway corporation operating a railroad in the state, may present the same; verified by affidavit, for payment, and that if at the expiration of thirty days after such presentation, such claim has not been paid, and if he has established his claim in court and obtained judgment, he shall be entitled to recover the amount of such claim, *and in addition thereto all reasonable attorney's fees, not to exceed \$10.*

This court, in holding the law void on the ground that it denied the railroad company the equal protection of the laws, say:

“The Supreme Court of the state considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute im-

posing a penalty upon RAILROAD CORPORATIONS for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors.
* * *

"It is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a *general proposition*, this is undeniably true (citing cases) yet it is *equally true that such classification cannot be made ARBITRARILY.* * * * *That (the classification) must ALWAYS REST UPON SOME DIFFERENCE WHICH BEARS A REASONABLE AND JUST RELATION TO THE ACT IN RESPECT TO WHICH THE CLASSIFICATION IS PROPOSED, and can never be made arbitrarily and without any such basis.*"

Referring to the statute before it, the court say:

"It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to *the delinquency of the debtor*, and would certainly create no inequality of right or protection. But before a distinction can be made *between debtors*, and *one* be punished for a failure to pay his debts, while *another* is permitted to become in like manner delinquent *without any punishment*, there must be *some difference* IN THE OBLIGATION TO PAY, *some reason why* THE DUTY OF PAYMENT is *more imperative in the ONE instance than in the OTHER.*

If it be said that this penalty is cast only upon *corporations*, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon *all corporations.* *The burden does not go with the*

*privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored. * * **

But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of *THE BUSINESS in which the corporations to be punished are engaged?* That such corporations may be classified *for some purposes* is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing the railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification *for the imposition of such SPECIAL DUTIES—duties arising out of THE PECULIAR BUSINESS in which they are engaged—*is a just classification, and not one within the prohibition of the Fourteenth Amendment. * * *

The hazardous business of railroading carries with it NO SPECIAL NECESSITY FOR THE PROMPT PAYMENT OF DEBTS. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

In the subsequent cases of *St. Louis, Iron Mountain, etc., Ry. Co. v. Paul*, 173 U. S., 404, and *Fid. Mut. Life Assn. v. Mettler*, 185 U. S., 308, the Ellis case is cited with approval but distinguished on its facts.

2. The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery,—to the liabilities for negligence of the particular corporations referred to,—railroad corporations—to their employes, does not rest upon any difference which bears a reasonable and just rela-

tion to ~~the thing~~ prohibited, and is therefore a mere arbitrary classification.

There are many things about the business of railroad companies which may justify special laws. The operation of trains is peculiarly dangerous. Therefore, the legislature in the exercise of the police power, may require railroad companies to fence their tracks, provide safety couplers on their trains. And it has been held that the exceptionally dangerous nature of the business may sustain a law like Sec. 2071, making them liable for the negligence of their employees towards other employees, provided such employees are at the time engaged in the operation of a railroad, although other corporations and employers are not subjected to any of these burdens.

But the hazardous nature of railroading carries with it no necessity or occasion for depriving railroad companies of the right to make a contract—which in no way restricts their liability for negligence, and which is in effect a contract of settlement—with their employees, and their employees of the right to make such contracts with the railroad companies employing them.

Much less is there any necessity or occasion on account of the nature of their business for depriving railroad companies and their employees of this right, while all other corporations, copartnership and individuals engaged in other occupations, such as mining, manufacturing, and transportation other than by rail, and their employees, enjoy the liberty of making the same contracts.

There is nothing in the peculiar nature of railroad transportation or the operating of railroads that can call for a different rule in this respect.

And even if there were any circumstances and conditions that would warrant the legislature in interfering with the contractual relations of the company and its employees, there can be no reason why other corporations and persons and their employees, in respect to this matter, should be exempted and given a special privilege not given to railroad companies.

To deny to a railroad company and its employees the right to enter into a contract of settlement of this class of claims and at the same time to permit other corporations and persons and their employees to enter into similar contracts to settle similar claims, is to deny to a railroad company and its employees the equal protection of the laws.

We quote in this connection the forcible reasoning of the dissenting opinion of Ladd, J., in the court below, concurred in by Bishop, J.:

"It would not seem that there is anything peculiar about railroad companies which should deprive them or their employees of the advantage of contracts of insurance, relief, benefit, or indemnity, in case of injury or death of their employees, when such advantage is accorded to OTHER CORPORATIONS AND THEIR EMPLOYEES *in the adjustment of the claims between them.* * * *

An examination of the decisions generally will demonstrate that something more tangible than a mere name, business, or purpose of a corporation is exacted by the courts as a basis of classification. There must be some connection between the legislation and THE SUBJECTS upon which it operates, and within the latter must be included all subjects in like situation and circumstances.

An instructive case is that of *Gulf, Colorado & Santa Fe R. Co. v. Ellis*, 165 U. S., 150. * * *

This decision is not impinged by what was said in *St. Louis, I. M. & S. R. Co. v. Paul*, 173

U. S., 404. * * * The Ellis case was again adhered to in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S., 96. * * * The Ellis case was again approved in *Fidelity Mutual Life Ass'n v. Mettler*, 185 U. S., 308."

3. The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery—to liabilities to a particular class of employes does not rest upon any difference which bears a reasonable and just relation to the thing prohibited, and is therefore a mere arbitrary classification.

(1) That the act cannot be sustained as an act based on a classification of *employes of railroad corporations*, as distinguished from *the employees of other corporations or persons*, is clear from the fact that the act does not apply generally to the employes of railroad corporations, or to the benefit contracts made by them.

It does not purport to prohibit the benefit contracts as to railroad employes. On the contrary, its prohibition—that such contracts and the acceptance of benefits under them shall not be a bar—is limited to liabilities incurred by railroad corporations *on account of the particular acts of negligence defined in the particular section*.

And the very limitation of the provision—that such contracts shall not be set up in bar to *the particular liabilities* defined and provided for by *the particular statutory provision*—recognizes the validity of the contracts as to all other claims of recovery against the corporations, whether for negligence or wilful wrongs.

Such contracts have the same validity and force,

which they were held to have by the previous decisions of the Supreme Court of Iowa, as to all employes of corporations not engaged in the operation of a railroad, as to *all* liabilities to such employes, and as to *all* employes of railroad corporations also, *except as to the particular liabilities of the class referred to in the statute.*

(2) In the nature of things, so far as it may be claimed that there is any classification as to *employes of railroad companies*, the attempted so-called classification bears no such relation to the thing prohibited—the setting up of the contracts of release in bar of the particular class of liabilities provided for in the original act—as made it a proper basis of classification for the purpose of the act.

There is nothing in *the nature of the duties* of the employes of the *particular class of corporations* that would afford any basis for the prohibition of the act—that the contracts of release should not be set up in bar of *the particular liabilities*—while the like contracts of release are made entirely valid and enforceable as to *all of the other class* of liabilities for negligence to *the same employes*.

Much less is there any basis for such a prohibition, making contracts of release void as to this class of liabilities as to employes of the particular corporations—corporations operating railroads—while the like contracts of release are entirely valid as to *all* the liabilities for negligence to employes of all other corporations and persons.

To deny to a railroad company or its employes the right to enter into a contract to settle this class of claims, and at the same time permit the same railroad company and the same or other employes to enter into similar contracts to settle other claims

for negligent or wilful acts, is to deny to the railroad company and its employes the equal protection of the laws.

We quote in this connection, on this point, the following from the dissenting opinion of Ladd, J., in the court below:

*"The subjects covered by the amendment are just as important to railroad employes NOT EXPOSED TO THE PECULIAR HAZARDS OF OPERATING TRAINS, and precisely as applicable to their situation and condition. Why invalidate insurance or relief contracts of the former and enforce those of the latter? Why give effect to the acceptance of benefits by the latter as an estoppel against the prosecution of a cause of action against the employer, and not do so when the acceptance is by the former? If there is 'some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them,' it has not been mentioned in the opinion of the majority. The fundamental defect in the amendment is that it does not bring 'within its influence all who are under the same conditions.' THE CONDITIONS UNDER WHICH THE INJURIES ARE RECEIVED can have no bearing on the question as to whether ONE SHALL BE BOUND by a waiver of his right to maintain his cause of action by reason of some contract of insurance, relief, benefit, or indemnity, and another shall not. BOTH STAND IN THE SAME RELATION to the company. * * ** There is no ground for thus discriminating between the employes of the same corporation, and such classification is arbitrary and unreasonable.

The facts of this case will very well illustrate the inequality of the law. The benefits of the defendant's relief department are not restricted to any class of employes. All may become

members. Nor are these limited to injuries for which the company might be liable. All manner of injury, as well as sickness, is included. 'In case of injury to a member, he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of their relief departments.' But acceptance of the benefits is made a bar to the maintenance of an action against the company, as is also the maintenance of such action a bar to any claim for relief. That is, a member must elect whether he will take the benefits stipulated by the regulations of the department, or rely on redress in the courts for his injuries. The plaintiff, though he had contributed but 85 cents to the relief fund and had expressly agreed to all the conditions, accepted benefits to the amount of \$492 and \$330 paid to his physicians, and then in disregard of said conditions instituted this action. As he had been exposed to the peculiar hazards of railroading, taking this money DID NOT BAR his right to recover from the defendant, if the amendment to the statute is valid. Had he suffered LIKE INJURY WHILE ENGAGED IN SOME OF THE OTHER EMPLOYMENTS of the company, the amendment would not apply, and under the decision in *Donald v. Railway*, 93 Iowa, 284, election to take the benefits of the Relief Department would have been final, and HE COULD NOT MAINTAIN THE ACTION. Is this equality before the law? The difference in the employments could by no possibility furnish ground for a distinction. What difference can there be, when it comes to the matter of settlement of claims between one of the trainmen and the company, growing out of the alleged negligence of a co-employee in the train service, and the claim of a shopman, growing out of the negligence of the master or vice-principal in that department? None whatever, for the manner of the injury has no relation to the subjects touched by the amendment. * * * Attention to

the question involved in the concrete, rather than the abstract, can lead to no other result. *The amendment nullifies agreements of ONE CLASS OF EMPLOYEES of railroad companies and permits those of another to be enforced.* A 'square deal' would exact that all employes be included and each be accorded the same protection by the law. It singles out for protection the claims of a *part of those in the service of railroad companies* and excludes from its benefits *the claims of the remainder* and of all employes in the service of all other corporations in *like situation*. *The courts are open to the FAVORED CLASS, notwithstanding any contract of insurance, relief, benefit, or indemnity, and acceptance thereunder, but to all others they are closed.* In the words of Mr. Justice Brewer, 'they do not enter court on equal terms.' What I object to is the *discrimination* by this statute between men *when there is no basis for such discrimination*. No favoritism should be tolerated. *If it is a good law for an employe who operates an engine, it is equally good for the dispatcher who directs the movement of engines and trains.'*

4. **The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery—to the particular class of liabilities for negligent and wilful acts of the corporation referred to, provided for in the act, does not rest upon any difference which bears a reasonable and just relation to the thing prohibited and is therefore a mere arbitrary classification.**

We have seen that the prohibitory provision of the statute, that the contract of release—of accord and satisfaction—which results from the acceptance of benefits after the injury has occurred, is limited

in terms to the particular liabilities incurred under the statute to which it was an amendment.

What just and reasonable basis is there for a classification for the purpose of the prohibition of the particular statute, in the fact that the particular liabilities for negligence or wilful acts were incurred *under the particular statute, or were of the kind there provided for?*

The nature of the duties of a large class of employees of railroad corporations is such that the liabilities of the corporation to them for negligent or wilful acts, are not liabilities under this statutory provision but liabilities at common law, for the reason that the injury was not caused by negligence *in the operation of the road*. As to this large class of liabilities to such employees, the contracts of release are therefore entirely valid and enforceable.

Can any sound reason be suggested why the legislature should have power to prohibit such a contract between the employee and the employer or between the particular class of employees and their employers, *as to the one class of liabilities*, at the same time that it is made valid and enforceable *as to all others?*

A liability incurred on account of the negligence or wilful act of an employee employed in the car shops is entitled to the same protection as a liability for the negligence or wilful acts of a trainman.

What is the reasonable basis for such an attempted classification?

The contract of release is the same as to all the different possible liabilities of the company for the negligent and wrongful acts of employees. It is based on the same consideration as to all these lia-

bilities. It is the same agreement not to claim the double compensation for the injury after the liability attaches and to elect which to accept.

Is there anything in the fact that the one liability was incurred while the employe was on the train or crossing a track, and the other while the employe was at work in the car shops of the company, or elsewhere than on the railroad, or in the fact that the one is a liability for negligence under a statutory provision and the other for a liability at common law, that affords any reasonable ground for the attempted distinction by classification?

There is the same liability in each case for the negligent or wrongful act of the company's employes. In either case the contract only becomes effectual as a bar in the event of a voluntary election by the employe after the liability has been incurred, to take the benefits rather than to sue the company.

We contend that this attempted classification has no just or reasonable relation to the thing prohibited—entering into a contract of release—of accord and satisfaction—by the acceptance of benefits on the terms of the benefit contract.

There is nothing in the nature of the thing prohibited—the making of the contract of release by the acceptance of benefits after the injury occurred—to justify a classification which limits the prohibition to *the particular class of liabilities* of the particular corporation—those resulting from the operation of a railroad.

There is nothing in the fact that the particular liability for negligence or wilful acts was incurred in the operation of a railroad, which makes the contracts of release *made after the injury occurred* and the liability has been fixed, a proper subject of classi-

fication for the purpose of the prohibitory and invalidating provision of the statute.

It is true that the particular liabilities for the negligence or wilful acts of the employer are incurred in the hazardous employment of operating a railroad, but there is nothing in the nature of the liability so incurred *as a liability* which has any special relation to the thing prohibited—the use of a contract of release voluntarily made by the acceptance of benefits *after the injury occurred*, as a bar to a recovery.

The particular liability after it had been thus incurred and fixed, is a liability at law for the damage suffered by the employe because of the injury.

When it has thus become defined and fixed, it is in no respect different from any other liability of the company to any other employe for other negligent or wilful acts as to the subject-matter of the act—the entering into what the Supreme Court of the state had previously held were voluntary contracts of release, made after the injury had occurred.

The act of the employe which, as the authorities all hold, including the Supreme Court of Iowa, creates the bar—the accord and satisfaction—is not the act of entering into the benefit contract or any other act done before the injury occurs, but the voluntary act of accepting the benefits after the injury and after the liability has become fixed in law.

Until this act has been done by the employe, there is the same liability of the employer to the employe that there was when the injury occurred, and this liability is the same and no greater than any other liabilities of the same employer for negligent or wilful acts not included within the statute.

What just or reasonable basis is there in the subject-matter of the act for making this contract of release, which is only effected by the voluntary acceptance of the money after the liability has been fixed, void in the particular cases provided for in the act, and valid and enforceable in all others?

The liability in either case is the liability of the employer under the law to make compensation to the employe for his injury. This liability belongs to the employe and is therefore as much a proper and lawful subject-matter for a contract of release and settlement between him and his employer in the one case as in the other.

5. The grounds on which the opinion of the Supreme Court of Iowa bases its ruling that the classification made by the act was not an arbitrary classification, but a reasonable and proper one, are untenable.

1. The classification can not be sustained on the ground—as held by the Supreme Court of Iowa—that it was based on a classification of railroads as distinguished from other corporations and persons, and that for that reason the classification was a proper one for the purpose of the act.

The question presented by this objection and considered by the court is thus stated in that part of the opinion which deals with the objection; (Rec., 63-65; 131 Iowa, 350-3.)

“Is the statute objectionable as class legislation, or as denying to the corporation the equal protection of the laws?”

The court, after citing cases, say (Rec., 64):

“That legislation imposing upon *railway companies* special restrictions, obligations and liabilities *not generally applicable to other per-*

sons or corporations is not a denial of the equal protection of the laws has been so often decided as to be no longer a debatable question."

The court then refer to particular cases in which statutes making particular provisions limited to railway companies had been sustained, and say (Rec., 65):

"In view of these decisions we think it beyond question that the statute here under consideration cannot be said to be void as a denial of the equal protection guaranteed by the Fourteenth Amendment."

It will be seen from these extracts from the opinion, that the court sustained the attempted classification made by the act, solely on the ground that it had been held in the cases cited that the statutes which made the particular provisions they did as to railroad corporations alone, were not a denial of the equal protection of the laws.

The manifest assumption of the opinion is that under the cases cited, *the mere fact* that an act relates to *railroad corporations, as distinguished from other corporations or persons, is in itself* a sufficient ground for its holding that the classification made by the act was a reasonable and proper one, and that without reference to, or any consideration of, the subject matter of the act itself.

The Ellis case and the subsequent cases decided by this court, cited *supra*, which recognized its ruling, and what has already been said on this point (*supra*, p. _____), are a sufficient answer to all that is said in the opinion to sustain the attempted classification made by the act, as a classification of railroad companies for the purpose of the particular act.

2. *The attempted classification for the purpose of the act cannot be sustained on the further ground*

stated in the opinion that it was a classification for the benefit of a special class of employees.

In another part of the opinion, the court, in dealing with the question of the classification attempted by the statute, say (Rec., 84), that the objection is "the objection which has been raised against every legislative bill which has ever been enacted for the benefit or relief of *any special class of employes* and in every instance has been overruled by the courts of last resort."

The court then cite a large number of cases sustaining this general statement.

If this reasoning means anything as applied to the act in question, it means that the act can be sustained as a legislative measure "for the benefit or relief of" a "*special class of employes.*"

That acts "for the benefit or relief of" a "special class of employes" may be lawfully enacted in the exercise of the police power is no doubt true, but this still leaves unanswered the question,—does the attempted classification which the act in question makes, find sufficient justification in the declared purpose and the necessary effect of the act itself?

This we have shown (*supra*, p. 123), it does not.

The court say, on the same point (Rec., 85):

"It is entirely too late in the day to insist that the special legislation affecting the rights and liabilities of *railway companies or other distinct class or kind of corporations* constitutes a denial of the equal protection of the laws, simply because the same regulation or restriction is not extended *over other corporations or other kinds of business.*"

The court then cite a long list of cases as supporting this conclusion.

This method of reasoning only meets the argument

by erroneously stating it, and is fully met by what we have already said on this point.

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CHESTER M. DAWES,

Of Counsel.

Office Supreme Court, U. S.
FILED

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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 62

CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY AND CHICAGO, BURLINGTON & QUINCY RAIL-
WAY COMPANY,

Plaintiffs in Error,

vs.

CHARLES L. McGUIRE,

Defendant in Error.

Error to the Supreme Court of the State of Iowa.

REPLY FOR PLAINTIFFS IN ERROR.

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Error to the Supreme Court of the State of Iowa.

REPLY FOR PLAINTIFFS IN ERROR.

I.

THE CONTENTION THAT THE ACT WAS PASSED IN THE
EXERCISE OF THE RESERVED POWER TO AMEND AND
REPEAL CORPORATE CHARTERS AND GRANTS OF SPECIAL
PRIVILEGES, HAS NO BASIS IN THE RECORD AND IS NOT
IN ANY VIEW SUSTAINABLE.

It will be noted in the first place that this conten-
tion, which would have been in itself fatal to the

entire claim of the invalidity of the act on the ground, so fully considered by the court below—that it violated the Fourteenth Amendment—is not even referred to in the opinion of that court.

(1) In support of this contention, counsel quote, from the Constitution of Iowa and the General Law of that state for the organization of corporations, the provisions which reserve to the Legislature the power to amend or repeal. (Brief, 22.)

The provision quoted from the constitution, reserving the power to amend or repeal, is expressly limited to “laws for *the organization or creation of corporations or the granting of special or exclusive privileges.*”

And the provision of the General Act quoted, reserving the power to amend or repeal, is expressly limited to: “corporations hereafter organized *under the provisions of this title, or whose organization may be adopted or amended* HEREUNDER.”

There is no pretense that plaintiff in error was *organized or created* under the laws of Iowa, or that it was *organized under* the particular general law quoted from. On the contrary, it is expressly conceded by counsel that it is a corporation of *Illinois* (Brief, 30), and it is referred to in the opinion as a foreign corporation. (131 Iowa, 369.)

These provisions, therefore, of the constitution and General Law, quoted and to which 8 pages of counsel's brief are devoted, admittedly have no application.

(2) It is, however, argued that the plaintiff in error was a corporation, whose "*organization*" was "*adopted or amended hereunder*"—under the General Statute referred to. (Brief, 30.)

To sustain this contention, the statement is made that plaintiff in error "has *filed its articles of incorporation* under Section 1637 of the Code *in the manner* as contemplated and therein provided," and it is argued that the effect of this was to make it a corporation "whose organization" was "*adopted or amended hereunder.*"

It will be noted that there is no reference to any page of the record in support of this statement. In fact, there is nothing in the record to show that plaintiff in error at any time filed its articles of incorporation in Iowa, and we deny that such was the fact.

(3) Even if it is assumed that the record showed—as it does not—that plaintiff in error had in fact filed its articles of incorporation, we deny that this establishes that it was a corporation "*whose organization*" was "*adopted or amended hereunder.*"

No reference is made by counsel to any provision of the Statutes of Iowa, which gives any such effect to the filing of articles of incorporation by a corporation of another state in Iowa.

(4) The object of the reservation, in whatever form expressed, was to preserve to the State control over the corporate franchises, rights and privileges which it had called into existence; in other words, to enable the state to repeal or modify that which it had granted.

It is only the special franchises and privileges derived, by charter or other grant, directly from the state, that the state has the right to withdraw or modify under this reserved power.

R. R. Co. v. Maine, 96 U. S., 499, 510, 511.

Spring Valley Waterworks v. Schottler,
110 U. S., 347, 371.

As illustrating this, not one of the cases cited by counsel was a case in which a statute was sustained, as an exercise of the reserved power of amendment and repeal, as to a foreign corporation.

The only cases cited, in which an act was sustained as an exercise of that power, were cases in which the act was sustained as to corporations *of the state*, which derived their corporate powers and franchises from *grants by the state*.

(5) In fact the law in question was not, and did not purport to be, an act passed in the exercise of this reserved power of amendment and repeal.

On the contrary, it applied in terms to *all* corporations *operating railroads* within the state, whether organized under the particular General Act or under other general acts or under special charters, and whether organized before or after the constitutional provision referred to, and whether corporations of Iowa or other states.

(6) In the very nature of things, this contention of counsel was necessarily involved in the decision of the State Supreme Court, in precisely the same way in which it is claimed to be involved in the hearing before this court.

And that it was necessarily passed upon by that court adversely to the contention made by counsel, is shown: (1) by the fact that it was directly involved, and (2) by the express holding of the court that the Act must be sustained as passed in the exercise of the *police power*. (131 Iowa, pp. 353-5.)

This ruling of the Supreme Court of Iowa which thus in effect held that these provisions as to the reserved power of the Legislature had no application, should be controlling on the question in this court.

To use the language of this court in *Gateway v. North Carolina*, 203 U. S., at 541, quoted by counsel (p. 54):

"It is elementary that under the circumstances we (this court) must *follow the construction* given by the State Court and *test the constitutionality* of the Statute under that view."

II.

THE CONTENTION THAT THE REGULATION OF THE RELIEF DEPARTMENT AS TO THE EFFECT OF THE ACCEPTANCE OF BENEFITS ONLY APPLIES TO "MEMBERS," AND THAT DEFENDANT IN ERROR WAS NOT A "MEMBER," AND, THEREFORE, THE QUESTION OF THE VALIDITY OF THE STATUTE IS NOT INVOLVED, IS NOT SUPPORTED BY, BUT IS IN FACT CONTRARY TO, THE RECORD.

The contention is that the provision of the regulation is that "in case of injury to a *member*, he may elect," etc., and that the defendant in error was not a "member," and therefore not within the provision. (Brief, 21, 88-89.)

(1) The entire contention is based on an assumption of fact which is not supported by the record, but is directly contrary to it.

It will be remembered that the judgment was entered on the demurrer to the 3d count of the answer to which the court sustained the demurrer, and therefore rendered the judgment it did.

Attached to this count of the answer, and made a part of it, are the regulations.

Regulation 17 (Rec., 13) provides that:

“All employes of the Company, who under the regulations are *contributors to the relief fund*, shall be designated as ‘*members of the relief fund.*’ ”

This count of the answer,—the allegations of which are admitted by the demurrer,—makes these express allegations: that “he (McGuire) made voluntary application” to be “admitted as a *member* of said Relief Department” and “that pursuant to said application, he was heretofore to wit, on the 29th day of December, 1900, duly *admitted to membership* in said Relief Department”; “that the said Charles L. McGuire became a *member* of the Third division and remained a *member* of said Relief Department until the 30th day of November, 1900, having paid *all his contributions* up to that date” and “was admitted to the *benefits of membership* under the terms of his admission as a *member* of the Relief Department”; “that he, McGuire, was, pursuant to the contract of his *membership*, entitled to benefits,” etc.; “that plaintiff McGuire demanded said bene-

fits", and that the benefits *were paid to him* "from time to time, as per terms of said regulations". (Rec., 8-9.)

(2) In the demurrer of the defendant which was sustained, and on which the judgment was rendered, it is expressly stated that "said defendant's answer, that is the portions here demurred to, *show that the plaintiff was a member of the Relief Department therein referred to.*" (Rec., 30.)

It will also be noted that nowhere in this demurrer, which is special, (Rec., 29-31), is the point made that the defendant was *not a member*, and therefore not within the regulation set up in the answer.

(3) This contention is also contrary to the express holding of the opinion of the Supreme Court of Iowa. The court, referring to the answer, the allegations of which were admitted by the demurrer, say:

"As a bar to the plaintiff's right of recovery, the defendant alleges that at the time of the accident in which the plaintiff was injured, *he was a member of the Burlington Relief Department,*" etc.

III.

THE DIFFERENT ERRONEOUS STATEMENTS OF COUNSEL,
WHICH ARE NOT SUPPORTED BY THE RECORD AND
WHICH FOR THAT REASON SHOULD BE DISREGARDED BY
THE COURT.

These statements of counsel are so numerous that they are important, not only in the particular con-

nection in which they occur, but also as illustrating the misleading character of the entire brief.

(1) As we have already shown the express statement (Brief, 30-31), that the Plaintiff in Error "*filed its articles of incorporation in Iowa in the manner required by the Section of the Statute referred to,*" is not supported by any reference to the record *but is wholly outside of it.*

(2) As we have also already shown the express statements (Brief, 21, 88-89), that the Defendant in Error "*was not a member of the Relief Department,*" is not only not supported by the record but is in fact directly contrary to the express averments of the answer, admitted by the demurrer, and also to the express statement made in the demurrer filed by counsel.

(3) On page 51 counsel refer to and quote at length from the opinion of the District Judge in *Miller v. C., B. & Q. Ry. Co.*, 65 Fed., 305.

Counsel, however, make no reference to the fact that on appeal the Court of Appeals ruled directly contrary to the ruling of the District Judge on the particular point, and this, too, notwithstanding the statement to this effect in our brief (Brief, 66-7), which counsel pass unnoticed.

(4) On page 57 counsel say:

"The employe is *forced* to either become a member or forced to leave the employment of the Company. The Company does not force the station agents to become members unless they want to, but they *compel* all their employes in the more dangerous part of their employment

to become members. *This is a matter of common knowledge.*"

This statement of counsel is *wholly outside of the Record*, and answering it in the only way we can, beyond calling attention to the fact that it is unsupported by the Record, we say that such is not the fact.

(5) On pages 57-8 counsel profess to quote what on their face are detached passages of a brief, said to have been filed by Judge Trimble, in the Iowa Supreme Court, as in effect an admission by Plaintiff in Error that "this alleged 'voluntary' organization was in fact *not voluntary*."

Manifestly this statement also is wholly outside of the record, and any supposed extracts from some former brief, not filed in this court, have no more place in the case, than would asserted extracts by us from previous alleged briefs of counsel.

(6) On page 58 counsel refer to and quote from what is stated to have been "McGuire's reply," alleged statements as to the conditions under which McGuire "made application to said Relief Department," and that he made such application "under compulsion."

No reference is made to the record in support of this statement, and no such asserted "McGuire's reply" can be found in the record.

On the contrary, the alleged statement that McGuire made his application to become a member of the Relief Department "under compulsion" is directly negated by the express averment in the an-

swer, admitted by the demurrer, that "he (McGuire) made *voluntary* application in due and legal form in *writing* on 19th day of November, 1900, to be admitted as a member of said Relief Department," and that "*pursuant to said application* he was heretofore, to wit, on the 20th day of November, 1900, duly admitted to membership in said Relief Department." (Rec., 8.)

(7) On p. 60 counsel make certain statements as to the alleged action of one Dr. J. L. Sawyer, stated to have been "a young medical examiner," in "making an incision in the abdomen of" defendant in error, that the defendant in error was a "total wreck," that "this medical examiner at Centerville adjudged that at the end of forty odd weeks" the defendant in error was "no longer disabled" and this decision was "a laughable farce of a decision."

There is no reference to the record in support of any of these statements, and there is not a word of evidence in the record which gives any support to a single one of them, and they are, in fact, as the writer of this brief is informed, contrary to the facts.

(8) On pp. 60-61 of counsel's brief, alleged extracts are made from Rule 29, on p. 62 from Rule 56, and on p. 63 from Rule 57, and certain inferences are sought to be drawn from these extracts.

In fact, not one of these three particular rules is in the record, and if counsel had claimed that they were in any way material to the issues, it was their duty to incorporate them by proper averments of fact.

In the nature of things, we cannot answer statements *thus wholly outside of the record* without ourselves also going outside of the record, which we have no right to do.

IV.

THE ACT IN QUESTION CANNOT BE SUSTAINED ON THE GROUND—AS IS IN EFFECT ARGUED—THAT A STATUTE PROHIBITING ALL CONTRACTS OF SETTLEMENT WOULD NOT VIOLATE THE PROVISION OF THE FOURTEENTH AMENDMENT, THAT NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, AND THAT THEREFORE THE PARTICULAR STATUTE WHICH PROHIBITS SUCH CONTRACTS OF SETTLEMENT AS TO THE PARTICULAR LIABILITIES REFERRED TO, WOULD NOT VIOLATE THAT PROVISION.

While it is our view this asserted ground for sustaining the act is in effect met by what is said in our original Brief, it is not there considered in the precise form in which it is above stated, and we shall therefore present our answers to it in this reply more specifically, and in so doing, shall endeavor to avoid unnecessary repetition.

We first call attention, again, in this connection, to two fundamental propositions, stated in our original brief, which are not controverted.

These propositions are:

1. *Liberty of contract is one of the rights which is protected by the provision of the Fourteenth Amendment, that no state shall deprive any person*

of life, liberty or property without due process of law, and for that reason any statute of the state which prohibits its exercise should be declared void by the court unless the act can be sustained as a valid exercise of the police power.

This proposition is fully sustained by the following authorities cited and quoted from in our Brief at pp. 40-41:

Lochner v. N. Y., 198 U. S., 45.

Allgeyer v. Louisiana, 165 U. S., 578.

Connolly v. Union Sewer Pipe Co., 184 U. S., 540.

Adair v. U. S., 208 U. S., 161.

McLean v. Arkansas, 211 U. S., 539.

2. *The liberty of contract includes both parties to the contract and, in the case of employer and employe, the right of the one is the same as the right of the other—there is an equality of right—and any legislation which disturbs that equality of right is an arbitrary interference with the liberty of contract.* (See our Brief, pp. 47-50.)

These two fundamental propositions being established, our contentions in support of the proposition under consideration, are:

1. **The contracts which the statute in question prohibited, were, as held in a long line of cases, including the previous express decisions by the Supreme Court of Iowa, contracts of settlement—of accord and satisfaction—resulting from the voluntary act of the parties in accepting the benefits after the injury occurred.**

Such was the express ruling of the many authori-

ties cited in our Brief and Argument (see pp. 65-75), which, as we have seen, represent a uniform current of authorities, including two express previous decisions of the Supreme Court of Iowa,—all based on the same reasons as to the character and binding effect of such contracts of settlement.

On this point, we quote in this connection from some of the many cases referred to in our brief, which are all to the same effect.

In *Johnson v. Philadelphia & Reading Ry. Co.*, 163 Pa. St., 127 (cited with approval by the Supreme Court of Iowa in the *Donald* cases) the court, in holding that the acceptance of benefits under the terms of the contract of membership was a bar to a recovery, say:

“It is not the signing of the contract but *the acceptance of benefits after the accident that constitutes a release*. The injured party, therefore, is not stipulating for the future but *settling for the past*; he is not agreeing to exempt the company from liability for negligence but *accepting compensation for an injury already caused thereby*.”

In *Leas v. Penna. Company*, 37 N. E. R., 423 (Ind.), the court say:

“There is no rule of public policy which discourages *the settlement of claims* of this character *by compromise* when made in good faith and as we have seen the payment and acceptance of the benefit money in the present case was *nothing more nor less than the adjustment and compromise of the claim after the injury*.
* * * The contract out of which the release arises is *really not concluded until after the injury*, and this contract is based upon the *consideration paid and voluntarily accepted also*

subsequent to the injury and these several acts constitute the contract, and *compromise between the parties*, which is not obnoxious to but favored by considerations of public policy."

In *Otis v. Penna. Co.*, 71 Fed., 136, the court say:

"After the injury the plaintiff was at liberty to *compromise* his right of action with the defendant for *any* valuable consideration however small, and, if he *chose to accept* a less amount than that which he might have recovered by action, *such settlement*, if fairly entered into, constitutes a *full accord and satisfaction*, from which the court cannot and *ought not* to relieve him."

And such was the law of Iowa at the time the statute in question was passed, as settled by two previous decisions of the Supreme Court of that state.

In *Donald v. C., B. & Q. Ry. Co.*, 93 Iowa, 284, the court say:

"The member in his contract *agrees with the company* that in consideration of its contributions to the fund, if he is injured, he will not take the benefits thus provided, and *besides ask for damages* because of the injury *but he has his election which he will take.*
* * * The employe when such *liability arises* has *his choice* to take the damages as he may be able to establish them *or the benefits* from the association. The company is liable for either at the *election of the employe but not for both.*"

In *Maine v. C., B. & Q. R. R. Co.*, 109 Iowa, 260, the court said:

"The plaintiff after receiving the injuries in question had the right *to elect* to accept the

benefits provided by the Relief Department *or* to hold the defendant responsible for its alleged negligence. *By accepting the benefits named he elected not to hold the defendant liable."*

2. The contracts of settlement, prohibited by the statute, do not differ from other contracts of settlement of existing causes of action between employer and employee, in any respect material to the question before the court—whether a statute prohibiting contracts of settlement is in violation of the Fourteenth Amendment.

This point is fully considered in our Argument at pp. 53-59, where the reasons which support it are fully stated.

3. The right of the employe on the one hand and of the employer on the other to contract for the settlement of an existing cause of action—a property right—is as much and for the same reasons, within the protection of the Fourteenth Amendment, as the right to contract for the purchase and sale of labor or of any other property right, and, it follows, for the same reasons, that any law which prohibits such contracts of settlement is void, unless it can be sustained as an authorized exercise of the police power.

This proposition is so self evident that it requires no discussion or citation of authorities.

4. An act prohibiting all contracts of settlement of existing causes of action between employer and employe would be a direct interference with the freedom of contract, and would be void, for the reason that such an act would not be an authorized exercise of the police power.

Clearly such an act would have no relation to either the public health or the public morals.

Nor could such an act be justified as an exercise of the police power to promote the public safety.

This is fully shown in the brief for defendants in error at pp. 59-63, to which, and the authorities there cited, we refer the court in this connection.

That there is nothing in the nature of the particular contracts of settlement, prohibited by the statute in question, or the circumstances under which they are made, which would justify a prohibitive statute on the ground that such a statute would promote the public welfare, we have also shown fully in our Brief and Argument at pp. 63-75.

It is, however, argued that a statute prohibiting all settlements between employer and employe could be sustained on the ground of the supposed inequality between employer and employe, and as therefore passed for the protection of labor.

We have considered this contention, as applied to the statute before the court, at length in our original brief (pp. 76-87), and much of what we have there said would apply equally to a statute prohibiting all settlements between employer and employe. See particularly pp. 81-87.

In view, however, of what is said in the brief for defendant in error, we will, in this connection, further state and define our positions on the particular point.

(1) It has been expressly held by this court that an act of the legislature, which prohibits particular contracts between employer and employe, cannot be sustained merely on the ground that it was based on a supposed inequality between the employer and employe, and that such attempted protective legislation is an unwarranted interference with the freedom of contract between the employer and the employe.

See particularly *Lochner v. N. Y.*, 198 U. S., 45, at p. 57, and *Adair v. U. S.*, 208 U. S., 161, at pp. 173-5, cited and quoted from in our Brief at pp. 47-50.

The express holding of these cases was, that to sustain such legislation, prohibiting contracts between employer and employe, something more must be shown than this mere supposed inequality in the making of contracts—that it must be established that the act had for its object some one of the purposes for which the police power can be lawfully exercised.

In the *Lochner* case, this court held that an act prohibiting contracts not to work beyond certain hours, and in the *Adair* case an act which in effect prohibited contracts, giving the employer the right to discharge an employe who belonged to a labor union, was void for the reason that it could not be sustained as passed for any purpose within the police power.

The necessary effect of the ruling in both cases was that the act could not be sustained on the mere ground of the supposed inequality between the employer and the employee.

In the *Lochner* case (198 U. S., 45) in holding that a statute, which provided that no employe should be required to work in bakeries more than a certain number of hours in a week or a day, was not a lawful exercise of the police power and was therefore void, this court say:

“There is no reasonable ground for interfering with the liberty of person *or the right of free contract*, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are *not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state.* Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us *involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.*”

In the *Adair* case (208 U. S., 161), this court held that an act of Congress, in effect prohibiting contracts of employment by a carrier, under which the carrier would have the right to discharge an employee, belonging to a labor organization, was in violation of the due process clause of the Fifth Amendment,—the same as that of the Fourteenth Amendment—and therefore void.

The court (Mr. Justice Harlan delivering the opinion) say:

"In our opinion that section, in the particular mentioned, is an invasion of *the personal liberty*, as well as of the right of property, guaranteed by that Amendment. *Such liberty and right embraces the right to MAKE CONTRACTS for the PURCHASE of the labor of others and equally the right to make contracts FOR THE SALE of one's own labor*; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which *the law UPON REASONABLE GROUNDS, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good.* * * * It was *the right of the defendant* to prescribe the terms upon which the services of Coppage *would be accepted*, and it was *the right of Coppage* to become or not, as he chose, an employe of the railroad company *upon the terms offered to him.*"

Manifestly, if there is any supposed inequality between a railroad company and an employe in the making of a contract for the settlement of a cause of action *after it has accrued and belongs to the employe*, there is the same and, if anything, a greater inequality between an employer and an employe—such as the employe of the baker in the *Lochner* case and the employe of the carrier in the *Adair* case—in fixing the terms on which the laborer shall be employed and which were, therefore, in effect made a condition of his being employed at all.

On this point we also refer the court to our reasoning on pp. 76-87 of our Brief, in support of the proposition that the act in question cannot be sus-

tained as passed for the protection of labor, which applies equally in this connection.

(2) The reasoning which would sustain a statute, prohibiting contracts of settlement between an employer and an employe, on the ground of a supposed inequality between them, requiring protective legislation, would apply with equal force to every contract which might be made between them.

And if a statute, prohibiting such contracts of settlement, can be sustained on that ground, it follows for the same reason that a statute, which provided that in the future no contract between employes and their employer as to the rate of the employe's compensation or his hours of labor or otherwise relating to his service, should be binding, but that, whatever the contract, the employe should be entitled to a certain rate of compensation or should be required to work only a certain number of hours a day or only at particular times, etc., would be equally valid.

No reason can be urged why any such statute would not be as free from objections as a statute which provides that contracts of settlement between employes and their employers, made after the cause of action accrued, should not be binding on the employe.

In point of fact, reasons, and plausible reasons, can be suggested why a statute regulating the employe's rate of compensation or his hours of work, etc., would be less open to objection—in view of the fact that they concern the service while it is going on—than a statute which merely has refer-

ence to a contract of settlement of a cause of action for injuries incurred in such service, made after the cause of action has accrued.

(3) The argument that the parties do not stand on an equal footing in contracting in regard to a settlement, can only be sustained on the ground that an employe, although an adult and capable of managing his own affairs, stands, *by reason of the mere fact that he is an employe*, in a position where he is subject to possible coercion or undue influence on the part of the employer, and is, therefore, to be treated like, and given the same protection as, an infant or a person of unsound mind.

We know of no reason or authority in support of any such view and it is in fact contrary to the express holdings in the *Lochner* and *Adair* cases quoted from *supra*.

The question presented, as to the power of the legislature to pass such a statute, is manifestly a wholly different one from the question as to the power of the legislature to pass laws, invalidating contracts between employers and employes, which can be sustained as based on some ground of public policy—such as laws regulating women's hours of labor in manufacturing establishments which have been sustained as *health* laws, or laws prohibiting contracts agreeing to waive liability for negligence in advance of an injury—which have been sustained on the ground that they are for the benefit of the public at large, as tending to promote the public safety.

(4) Employees are protected now as to their contracts of settlement under general rules of law, which are well recognized.

Thus if a settlement is procured from an employee by fraud or duress, or under circumstances which show that the employee did not understand what he was doing when he executed a release, the settlement is not binding on him and cannot be enforced against him.

This protection is ample, and it cannot be argued that there is any ground, affecting the public welfare or the common good, on which a statute can be based, which prohibits in the future the making of contracts of settlement between an employer and an employee, where the employee, after the injury and acting with full knowledge of his condition and of all the circumstances, and with the full opportunity to consult counsel and consent for himself, agrees to a contract of settlement.

V.

THE STATUTE IN QUESTION SHOWS ON ITS FACE THAT EVEN IF THERE IS ANY POSSIBLE VIEW IN WHICH A STATUTE PROHIBITING ALL SETTLEMENTS BETWEEN EMPLOYERS AND EMPLOYEES COULD BE SUSTAINED, THE END THE LEGISLATURE HAD IN VIEW IN PASSING THE ACT BEFORE THE COURT WAS NOT ONE OF THE PURPOSES FOR WHICH THE EXERCISE OF THE POLICE POWER IS AUTHORIZED, AND FOR THAT REASON ALSO IT CANNOT BE SUSTAINED AS PASSED IN THE EXERCISE OF THE POLICE POWER.

In the very nature of things, if an act itself shows

that the end which the legislature had in view was not one of the purposes for which an exercise of the police power is authorized, the act cannot be sustained on the ground that it was passed in the exercise of that power.

As illustrating this, it is plain that an act could not be sustained on the ground that it was passed in the exercise of the police power to promote the public health, whatever its provisions, if it were shown, by express recitals, or other express provisions, that the legislative purpose was not to promote the public health, but that it had some other and entirely different purpose.

We have shown in our Brief and Argument (pp. 59-60, 78-83) that the act in question negatives, by its very provisions, an intention on the part of the legislature to promote any of the purposes for which it is contended that it can be sustained as an authorized exercise of the police power.

V I .

IT HAS BEEN HELD IN A NUMBER OF FORCIBLY REASONED CASES CITED AND QUOTED FROM IN OUR BRIEF AND ARGUMENT (see pp. 108-117)—TO WHICH WE CALL THE PARTICULAR ATTENTION OF THE COURT—THAT STATUTES SIMILAR TO THAT IN QUESTION WERE IN VIOLATION OF THE PROHIBITION OF THE FOURTEENTH AMENDMENT THAT NO PERSON SHALL BE DEPRIVED OF HIS LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, AND LIKE PROHIBITIONS IN STATE CONSTITUTIONS.

We call the particular attention of the court to the

forcible reasoning of these cases in the quotations from them in our Argument, at pp. 108-117, and particularly to the cases of *Shaver v. Penna. Co.*, 71 Fed. Rep., 931, and *Sturgis v. Atlantic Coast Line R. Co.*, 80 S. E., 167, in both of which the statute was held void on the ground that it was in violation of the due process clause of the Fourteenth Amendment. (Argument, pp. 109-113.)

We also call the particular attention of the court in connection with *Sturgis v. Atlantic Coast Line R. Co.*, to the case of *Atlantic Coast Line R. Co. v. Dunning*, 166 Fed., 856 (decided by the Circuit Court of Appeals of the Eighth Circuit in 1908, Chief Justice Fuller sitting as one of the court), in which it was expressly held that the statute of South Carolina was void under the decision in *Sturgis v. Atlantic Coast Line R. Co.* (Argument, p. 113.)

VII.

THE OTHER CONTENTIONS OF COUNSEL IN ANSWER TO THE PROPOSITION THAT THE ACT IS AN UNAUTHORIZED INTERFERENCE WITH THE FREEDOM OF CONTRACT GUARANTEED BY THE FOURTEENTH AMENDMENT.

1. It is argued that the company and its employes are not on equal terms—are not dealing at arm's length—and that the act was passed because of this supposed inequality. (Brief, 55.)

This point we have already sufficiently answered.

It is stated by counsel in this connection that after the injury, "the adjusting agent" calls on the in-

jured person and "*presses*" the acceptance of the benefits on him.

There is nothing in the regulations or in any facts in the record to justify any such statement.

As shown by the record, the member is given sixty days after the injury to present his claim, (Rec., 24) and he therefore has in any event sixty days in which to make his election whether to accept the benefits or sue the company.

As further shown by the record, the payments are made by check to the order of the member, which may be declined by him when tendered or endorsed and cashed, at his pleasure.

The record shows that McGuire was injured November 30, 1900 (Rec., 9), and the first check was not drawn until January 8, 1901 (Rec., 26). There were, therefore, forty days between the injury and the date when the first money was tendered.

Reference is made by counsel, in connection with this point, to *Holden v. Hardy*, 169 U. S., 394.

It is enough to say as to that case, that the particular statute, which limited the hours of work of miners, etc., was sustained on the ground that it was passed for the protection of the *health* of the employes, engaged in the particular employment of *mining*, etc. And in the subsequent case of *Lochner v. New York*, 198 U. S., 45, this court held that a similar statute, which limited the hours of work of those working in bakeries, could not be sustained as passed for the protection of the *health* of the class of employes referred to, and that this being so, the

act could not be sustained solely on the ground of the supposed inequality between employer and employe in the making of contracts between them, and that for that reason the statute was void.

See also, *Adair v. United States*, 208 U. S., 161, to the same effect.

2. It is argued that membership in the Relief Department is not voluntary—that the employe is forced either to become a member or to leave the employment of the company. (Br., 57.)

As already stated in another connection, there is nothing in the record to sustain this statement, but on the contrary the averments of fact in the answer, admitted by the demurrer, are wholly inconsistent with it.

These averments are that membership in the Relief Department is *voluntary* and that McGuire made *voluntary* application for membership.

Again, all the many authorities cited in our Brief, including the two decisions of the Supreme Court of Iowa, hold that it is not the contract of membership that bars the right of recovery.

On the contrary, notwithstanding the contract of membership, by the very terms of the regulation the member has the same right of action against the company, if he elects to bring suit instead of accepting the benefits, that he would have if he was not a member.

It is only the acceptance of the benefits after the injury has occurred, with an opportunity of choice

after consulting counsel, as in the case of any other offer of settlement, that constitutes the bar.

See further on this point, our Brief and Argument, pp. 66-75.

In connection with this contention, counsel refer to a brief, which it is stated was filed by Judge Trimble in the Supreme Court of Iowa, and the alleged "reply" of McGuire, as sustaining the statement made—that the membership is not voluntary.

A sufficient answer to this is, as we have shown in another connection, that it is wholly outside of the record, and, therefore, in the very nature of things, cannot be considered by the court.

3. It is argued that the employee, in accepting the benefits after the injury occurred, simply accepts *what he pays for*. (Br., 59.)

This assumption ignores the fact that the dues of the member are paid, and the contributions made by the other members and the company, to create and preserve the relief fund *on the terms expressly provided in the regulations*, by which the company and the members agreed to be bound as constituting the contract between them.

By the terms of these regulations, *the other members and the company contracted with the defendant in error* that in consideration of the dues paid by him—eighty-five cents—he should receive, and the Relief Department should pay to him, the benefits provided for, *only on the terms and subject to the provisions provided in the regulations*.

(1) That in case of his sickness, he should be paid the benefits to the amount agreed to be paid.

(2) That in case of an injury for which there was no claim of recovery on his part against the company, he should be paid the full amount of the benefits agreed to be paid.

(3) That in case of an injury, incurred under such circumstances that he claimed to have a right of action against the company to recover compensation for the injury, he should have the option either to accept the benefits or to sue the company, but that, if he elected to accept the benefits, he should not have the right to also sue the company, or, if he elected to sue the company, he should not also have the right to demand the benefits—that he should not be entitled to the double compensation for the same injury of both the benefits and his right of recovery against the company.

All of these things which it was agreed he should be entitled to, in consideration of the dues paid by him, were in themselves the full and sufficient consideration for the dues paid by him on the terms agreed to.

In fact, the act in question not only prohibits the particular contracts of accord and satisfaction between the employer and employe, but also *necessarily invalidates one of the essential terms of the contract between the company and each of the members and of the members with one another*, under which the Relief Department was created and has been maintained—a contract evidenced by the Regulations

by which the company and all the employes, becoming members of the Relief Department, agreed to be bound. (Rec., pp. 3-4.)

The necessary effect of the statute is not only to defeat the particular contracts of accord and satisfaction with the company, but it also enables any member of the Relief Department, by first accepting the benefits and afterwards suing the company, to defeat his express agreement *with each of his fellow members and with the company*, that in case he elected to sue the company, he should not have a right to the benefits *out of the relief fund*, to which his fellow members, as well as the company, had made their contributions on the terms of the Regulations.

(See, also, our Brief and Argument, pp. 53-57, where this point is further considered.)

4. It is argued that different regulations of the Relief Department referred to, other than the particular regulation which provided that the acceptance of benefits should be a bar to a recovery, were, in different alleged particulars—wholly immaterial to the prohibition of the statute—unfavorable to the employe. (Br., 59-64.)

The provisions referred to are the provisions as to the method of electing or appointing officers of the Relief Department (Br., 59), as to the method of medical examination (Br., 60-62), as to the method provided for *amending* the regulations (Br., 60), as to *the time* for which members shall be entitled to benefits (60-61), the method of terminating member-

ship (60-62) and as to the amount of benefits to be paid in particular cases (62-63).

(1) As we have shown in another connection, three of the Regulations—Rules 29, 56 and 57—(Br., 60, 61, 62 and 63), from which alleged extracts are made, are not in the record, and, in the nature of things, we cannot answer what is said with reference to them, without ourselves also going outside of the record, which we have no right to do.

(2) The subject-matter of these different Regulations manifestly has no possible relation to the subject-matter of the act in question.

While we do not concede for a moment the correctness of the criticisms made of these different Regulations, a sufficient answer to all that is said with reference to them is, that they afforded no possible ground for the particular prohibition of the statute in question—the setting up in bar of a recovery of the acceptance of benefits under the membership contract.

These different Regulations of the Relief Department, criticized in this part of the brief, manifestly had nothing to do with the question of the fairness and justice of the Regulation as to the effect of the acceptance of benefits and the accord and satisfaction the courts had held resulted from it, and which the particular act provided should not be set up in bar of a recovery.

If the statute was passed because of, and was therefore aimed at, any supposed unfairness in the plan of the Relief Department, as evidenced by these

other Regulations, the appropriate remedy would have been to either prohibit the particular Regulations complained of, or the Relief Department altogether.

The very fact that the statute in question was thus limited to the one thing it prohibited, and that it did not in any other particular prohibit or otherwise make illegal the Relief Department or any of its Regulations, shows that the other Regulations referred to and the criticisms made of them were wholly aside from the question before the court.

(3) That the act in question—both in its purpose and its prohibition—had reference solely to the accord and satisfaction that the courts had held resulted from the acceptance of benefits under the particular Regulations, and had no reference to the rights of the member under the benefit contracts in any other particular, is conclusively shown by the fact that this prohibition extended in terms to “*any contract of benefit*” and the “*acceptance of benefits*” under “*any such contract of benefit.*”

If, therefore, the defendant company and the members of the Relief Department had agreed that every one of the other Regulations criticized by counsel, should be changed so as to meet the criticisms made by them, and this agreement had been carried into effect by making the necessary changes in each *before the act went into effect*, the prohibition of the statute would still have applied to “*any contract of benefit*” thereafter made, or to “*any acceptance of benefits*” under such contract.

(4) While, for the reasons we have already stated, any detailed discussion of the different criticisms, made by counsel of the Regulations referred to, would be wholly aside from the question, we will state briefly the answers to some of them, as further illustrating their irrelevance.

It is argued that the medical examiner is given the right to "decide when members are disabled and when they are able to work, and that this gives much room for *oppression*." (Br., 59-60.)

It would be manifestly unreasonable and unbusiness-like to allow either the member injured or such physicians as he might select, to decide as to when his disability terminated. To do so would be to practically throw open the treasury of the relief fund to the injured members and to let each one take what he, or the physicians *selected by him*, should decide he was entitled to.

In addition to this, the alleged facts stated in support of this criticism (Br., 60) are wholly outside of the record. No reference is made to any pages of the record as supporting the statement, and there is in fact nothing in the record to sustain it.

It is stated that, under Rule 46, it is not the intention to award any substantial sum for permanent injuries. (Br., 62.)

In fact, the Regulation gives the members of the third class, to which McGuire belonged, \$1.50 per day for 52 weeks, and 75 cents per day thereafter *during the entire continuance of the disability, and therefore during life if the disability continued.*

In addition to this, the Regulation provides that

the member shall be entitled to medical and surgical treatment.

It is argued that, under Regulation 47, a member of the third class can receive nothing *after 52 weeks*, "even though he be sick for 52 weeks longer." (Br., 62.)

A sufficient answer to this is that this particular rule only related to the benefits to be paid *in case of sickness*. In case of *disability from injury*, there was a per diem fixed for the entire period of the disability—for life if the disability continued during that time. In addition to this, Rule 51 provided that the limit of 52 weeks, fixed by Rule 47 in cases of sickness, should be increased by one week for each year after membership above four years, to a maximum of 78 weeks.

VIII.

THE STATEMENTS OF COUNSEL AS TO THE FEDERAL EMPLOYERS' LIABILITY ACTS ARE ERRONEOUS AND MISLEADING, AND OTHER EMPLOYERS' LIABILITY ACTS WHICH ARE MORE ANALOGOUS BY REASON OF THE FACT THAT, LIKE THE REGULATIONS OF THE DEFENDANT'S RELIEF DEPARTMENT, THEY PROVIDE FOR COMPENSATION IN ALL CASES, ACCORDING TO A FIXED SCALE, AND AT THE SAME TIME REQUIRE AN ELECTION BY THE EMPLOYEE, IF THE RIGHT TO SUE FOR A LARGER LIABILITY IS CLAIMED, CONFIRM THE JUSTICE AND FAIRNESS OF THE RELIEF DEPARTMENT REGULATIONS REQUIRING SUCH ELECTION.

Counsel refer to the fact that the Federal Employers' Liability Act of 1906 contains a provision (Section 3) similar to the provision of the Iowa law

in question, and argue that this court's holding in *Howard v. Railway Co.*, 207 U. S., 463, that the entire act was void on the ground that it applied as well to intra-state as inter-state commerce, was somehow a recognition of the validity of Section 3. (Br., 17.)

The reasoning that the holding by the court that the *entire* act was void, can be given the effect of the recognition of the validity of *part* of it, answers itself.

In fact, no question arising under Section 3 was involved in *Howard v. Railway Co.* The facts in the case presented no such question.

It is, however, said by counsel that "the *same provision* was engrafted in the second Act of April 22, 1908," and it is argued that the fact that Congress "had thus *concurred in two enactments* in effect condemning such schemes," etc., "would be according to many of your (this court's) cases, entitled to great weight."

In fact, the same provision as Section 3 of the original act was not "engrafted" in the Act of 1908.

On the contrary, a wholly different provision was substituted for the corresponding provision in the original Act (Section 3—U. S. Compiled Statutes, 1901, Supplement of 1909, p. 1149). This new provision is as follows:

"Section 5. That any contract, rule regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to *exempt itself* from any liability created by this act, shall to that extent be void. *Provided* that in any action brought against such common car-

rier under or by virtue of any of the provisions of this act, such common carrier *may set off* therein any sum it has contributed or paid in any insurance, relief benefit, or indemnity, that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which such action was brought."

(U. S. Compiled Statutes 1901, Supplement of 1909, p. 1173.)

As to the proviso of this section it is sufficient to say in this connection that it manifestly cannot be construed as enlarging the effect of the prohibitory part of the section to which it is added.

This provision (Section 5) clearly had reference to contracts *in advance of* the injury for an *exemption from* liability for negligence.

Such was the express holding in the following cases cited in our Brief, in which statutory provisions, substantially the same or even stronger in their terms, were held not to prohibit such contracts of accord and satisfaction.

P. C. C. & St. L. R. R. Co. v. Cox, 55 Oh. St., 497.

R. R. Co. v. Moore, 152 Ind., 345.

Petty v. B. & N. Ry. Co., 115 Ga., 853.

Donald v. C. B. & Q., 93 Ia., 284.

Maine v. C. B. & Q., 109 Ia., 260.

The very fact that Congress, in passing the new act—that of 1908—made the changes it did in the provision of the original act, shows that it had in mind these many decisions as to the effect of a provision like that adopted by it in making the changes.

There are other Employers' Liability Acts which

are more in point for the reason that they contain provisions for compensation similar to those made by the Regulations of the defendant's Relief Department, and a similar provision requiring the employe to elect whether he will accept the compensation thus provided for or sue the company.

Such are the Employers' Liability Acts passed in England in 1906. (Public Gen. Acts, 6 Edw. VII, 1906, pp. 325-348.) A like Employers' Liability Act for British Columbia, passed in 1902. (Statutes of British Columbia, 1902.) The still more recent Act passed in New York in 1910. (New York Session Laws 1910, Vol. 2, Ch. 674, p. 1945.)

The general plan of these acts is the same as that of the defendant's Relief Department in these particulars, (1) They provide for compensation in case of an injury to an employe in the course of his employment. (2) They fix the same scale of compensation for the injury without reference to the circumstances of the particular injury, *graded according to the wages of the employe.*

It is true that under these acts no contribution is required from the employe himself—that the entire payment is made by the employer—and that in this respect they differ from the plan of the defendant's Relief Department. The provision for compensation is, however, limited to *injuries* resulting from the ordinary hazards of the business or on account of the negligence of the company.

On the other hand, the Relief Department Regulations of plaintiff in error provide for the same compensation in cases of *sickness*, as well as in cases of *injury from accident.*

The allegations of the answer of the defendant company, admitted by the demurrer, show that in the eleven years during which the company had maintained its Relief Department, substantially one-half of all the benefits were paid in cases of *sickness* and the other half in cases of *injury from accident*. (See our Brief, p. 10.) In the first of these cases, there could be no claim of liability of the company, and in the second there would be a large number in which there could be no such claim, and in others the claim, if any, would be doubtful and uncertain.

On the other hand, the company contributed, during this period of the support and maintenance of the Relief Department, an amount substantially *equal to the entire amount paid for physical injuries*. (See our Brief, p. 11.) In other words, the amount contributed by the members was only sufficient to pay the benefits actually paid in cases of *sickness* and to maintain the Department which was for their benefit, and the company therefore paid what was equivalent to the entire amount paid for *all injuries from accidents*.

The effect, therefore, was that the company, by this voluntary arrangement under which the Relief Department was created and maintained, provided for substantially the same ²compensation to be paid by it to employes, which was provided for by these subsequent Employers' Liability Acts.

In addition to this, the scale of compensation in case of injuries was higher in the case of the company's Relief Department than that provided for in the Employers' Liability Acts referred to.

As illustrating this, the maximum amount provided by the New York Act, in case of death, is \$3,000, while the maximum amount given by the defendant's Relief Department is \$5,000.

So under the New York Act, the maximum paid per week to any employe is \$10, while the maximum paid by defendant's Relief Department is \$17.50, and under the New York Act the period for the payment for disability is limited to eight years, while the payments by the Relief Department are for life, if the disability continues.

As we have seen, under these Employers' Liability Acts and the regulations of the defendant's Relief Department, there is the same provision for the payment of a fixed sum in all cases, graded by the wages of the employe. And because of this, if in particular cases the employe claims that, under the facts, he is entitled to recover a larger amount by a suit against the company, there is the same occasion in both cases for requiring an election by the employe to either accept the fixed compensation provided for, or sue the company for the larger amount claimed.

And, as confirming the justice and fairness of the provision of the defendant's Relief Department, requiring the employe claiming the larger right of recovery, to make his election, substantially the same provision is made in each of the Employers' Liability Acts referred to.

The provision is in substance that in case of an injury, if the employe claims that he has a right of action against the company, based on its negligence

or wilful wrong, he shall have the right *to elect* whether to take the fixed compensation provided in the Act, or to sue the company on its liability, but that he shall not be entitled to *both*, and that the acceptance of the one *shall be a release of the other*.

As illustrating this, the provision of the New York Act is as follows:

“§218. RIGHTS OF ACTION NOT AFFECTED. The right of action for damages caused by any such injury, at common law or under any statute in force in January one, nineteen hundred and ten, shall not be affected by this article, and every existing right of action for negligence or to recover damages for injuries resulting in death *is continued*, and nothing in this article shall be construed as *limiting such right of action*, but in case the injured workman, or in event of his death his executor or administrator, *shall avail himself of this article*, either by *accepting* any compensation hereunder in accordance with section two hundred and nineteen-a hereof or by *beginning proceedings therefor* in any manner on account of any such injury, he shall be *barred from recovery* in and deemed thereby *to have released* every other action at common law or under any other statute on account of the same injury after this article takes effect. In case after such injury the workman, or in the event of his death his executor or administrator, *shall commence any action* at common law or under any statute other than this article against the employer therefor *he shall be barred from* all benefit of this article in regard thereto.”

There is substantially the same provision in the Employers' Liability Act of British Columbia, passed in 1902,—Section 2 (b)—and in the Employers' Liability Act of Great Britain, passed in 1906,—Section 1(b).

IX.

THE STATUTE IN QUESTION IS IN VIOLATION OF THE PROVISION OF THE FOURTEENTH AMENDMENT THAT NO STATE SHALL DENY TO ANY PERSON THE EQUAL PROTECTION OF THE LAWS.

The contentions of our Brief in support of this proposition (pp. 35-38, 117-134), are wholly unanswered in the Brief for defendant in error.

In the only part of the Brief for defendant in error which has any reference to this proposition (pp. 7-8), counsel cite certain authorities in support of general propositions which we have no occasion to controvert.

They also cite cases in which it was held that particular statutes, limited to railroad corporations, were valid.

The distinction between the classes of cases cited and the cases on which we rely, we have pointed out in our original Brief (pp. 131-4, 118-120).

We therefore submit that for the reasons urged in our original Brief (pp. 117-134), and wholly unanswered in the Brief for defendant in error, the act should be held void on the ground that it is in violation of the provision of the Fourteenth Amendment, that no state shall deny to any person the equal protection of the laws.

JOHN J. HERRICK,

Attorney for Plaintiffs in Error.

CHESTER M. DAWES,

Of Counsel.

1

SALE

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House of Representatives, 1st Session, 1898-99
CHICAGO

Printed and Published by the State of Illinois
CHICAGO

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 247

**CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY, & CHICAGO, BURLINGTON & QUINCY RAIL-
WAY COMPANY, PLAINTIFFS IN ERROR,**

vs.

CHARLES L. McGUIRE

In Error to the Supreme Court of the State of Iowa.

**John J. Herrick and Palmer Trimble, Attorneys for
Plaintiffs in Error.**

**Howell & Elgin and A. J. Baker, Attorneys for Defendant
in Error.**

**Brief and Argument of Charles L. McGuire, Defendant in
Error.**

THE ISSUES

The petition of the plaintiff claims two thousand dollars as damages, on account of injuries which he claims to have received while acting as defendant's brakeman and on account of negligence of defendant's employees.

Defendant in answer, sets up as a bar to the plaintiff's right of recovery, the alleged fact, that at the time of the injury that plaintiff was a member of an association organized by the defendant and its employees, known as "The Burlington Relief Department," (the rules and regulations of which are made a part of the answer and are found in the Abstract from pages 10 to 28 inclusive) and that on account of said membership, the plaintiff was entitled to and drew the certain benefits, while incapacitated by a physical injury, alleging that he drew in the aggregate the sum of eight hundred and twenty-two (\$822.00) dollars. Farther alleged that by the terms of the contract embodied in the relief department regulations, plaintiff had an election to take the benefits, or to waive them and insist upon his claim against the defendants for damages.

That he was not entitled to both, that he accepted the benefits and is now estopped from recovering anything in this action. It is farther stated in the answer that Section 2071 of the Code, as amended by the 27th General Assembly, have no effect to bar or prevent the defendant from setting up the defense above stated, because said Section, (which is known in Iowa as the "Temple Amendment" and by which name it will be hereinafter referred to) is unconstitutional, in contravention of the constitution of the United States.

HOW ISSUES DECIDED

There was a trial to the jury, verdict for two thousand dollars and judgement thereon, appeal to the Supreme Court of Iowa, affirming, and appeal by writ of error to this court.

BRIEF

Note—

The Counsel making this brief, is at a disadvantage, on account of the fact that he had not as yet been favored with

a copy of the Company's brief, till this was about completed and this term of court well advanced.

(I)

The Temple amendment is not in violation of the constitution of the United States and especially Section 1, Article 14 of the amendments to said constitution, as claimed but was passed in the rightful exercise of the powers reserved to the State and vested in the legislative branch, thereof.

(a.) While it is an imperative duty, from which no court will shrink, to declare void any statute, the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and judicial departments of our government, requires that **this prerogative be exercised with the greatest caution**, and only after every reasonable presumption has been indulged in favor of the validity of the act."

M. Guire vs. Railway, 131 Ia. 340.

Sioux City R. R. vs. Sioux City, 78 Ia. 371 and 346.

Sherman vs. Smith, 1 Black 587.

Miller vs. State, 15 Wall 478.

Merchants Union vs. Brown 64 Ia. 275.

Holyoke Co. vs. Lyman, 15 Wall 500.

Sinking fund cases 99 W. S. 700. Bank vs Talcott 19 N Y 146

Sioux City R. R. vs. Sioux City, 138 U. S. 98 (34 L. Ed. 899.)

Stewart vs. Supervisors, 30th Ia. 9.

Holyoke Water Power Co. vs. Lyman, 82 U. S. 500, (21 L. Ed.

139. Road Co. vs. Woodhull, 25 Mich. 99.

Cen. Pac. R. R. Co. vs Gallatin, 99 U. S. 727, (25 L. Ed. 505.)

Iron Co. vs. K'ine, 199 U. S. 593. Evans vs. Job, 8th Neb. 322.

St. L. I. M. & S. R. R. vs Paul, 173 U. S. 404.

Duncomb vs. Prindle, 12th Ia. 1. Leep vs. R. R. 58 Ark. 407.

Ex. Parte Davis 21 Fed. 396. Ins. Co. vs. Daggs 172 U. S. 557

R. R. vs. Day, 82 Ia. 344. Holden vs Hardy, 169 U. S. 552

Missouri Pacific Ry Co. vs Mackey, 127 U. S. 205.

Railroad vs Herrick, 127 U. S. 210, 32 L. Ed. 109.

R. R. vs. Matthews, 165 U. S. 1.

Iron Co. vs Harbarson 183 U. S. 13. Ry. vs Castle 173 Fed. 841

(b.) The Supreme Court of the United States "May not consider evils which it is supposed will arise from the ex-

cution of the law, whether they be real or imaginary," in passing on the constitutionality of any given law; nor its province to pass upon the policy, wisdom, or justice of the statute or the expediency of its enactment.

Howard admrx vs Ill. Central R R et al, 207 U. S. 492 52 L. Ed

306. Missouri Pacific Ry. Co. vs. Humes, 115 U. S. 512
State vs. Evans, 110 N. W. R. 241 (Wrs.)

Barbier vs. Connely, 113 U. S. 27.

Soon Hing vs. Crowley, 113 U. S. 703. Kiley vs Ry. 119 N. W.
R. at 314 Wis.

(c.) Liberty of contract is not a universal right and may be abridged when required for the public good.

McLean vs. Arkansas, 211 U. S. 539.

M. & S. L. R. R. vs. Beckwith, 129 U. S. 26.

People vs. Ry. 91 N. E. R. 849.

Welch vs. C. B. & Q. R. R. 53 Ia. 632.

Jones vs Railroad 16 Ia pg 6. Ry Co vs McCann 174 U S. 805

Iowa Code Sec. 2055, 2074. Smeltzer vs. Ry. 158 Fed. 649.

Brush vs. Railroad 83 Ia. 554.

Davis vs. Railway 83 Ia. 744. Lucas vs. R. R. 112 Ia. 594.

Waters-Pierce Oil Co., vs Texas, 212 U. S. 86.

McCune vs. R. R. 52 Ia. 602. Rose vs. R. R. 39 Ia. 246.

Solon vs. R. R. 95 Ia. 260.

C. M. & St. R. R. vs. Solon 169 U. S. 133 42 L. Ed. 688.

Smith vs. Alabama, 124 U. S. 465.

N. C. & St. L. R. R. vs. Alabama, 128 U. S. 96.

N. Y. & N. H. & H. R. Co. vs. N. Y. 165 U. S. 628.

Western U. Tl. Co vs James, 162 U S 650.

Pennington vs. Georgia 165 U. S. 299.

Gladson vs. Minnesota 166 U. S. 427.

Cn. Trust Co. vs Sloan et al 65 Ia. 656.

Ia. Code Sec. 2046.

(d.) Annalagous statutory provisions of Iowa statute, even more drastic, have been upheld by this court.

Sec. 2046 making absolute liability for fire, upheld in St. L. & S. F. R. R. vs Matthews 165 U. S. 1 42 L. Ed. 611.

Rhody Maker vs. Ry. 41 Ia. 297.

Small vs. R. R. 50 Ia. 388.

Sec. 2164 Ia. Code, absolute liability for mistakes in telegrams etc. upheld in Garnett vs. W. S. T. U. Tl. Co. 83 Ia. 257.

Sec 1727 Code Ia. nullifying contracts between assured and Insurance Company as to avoidance of policy for non-payment of premium, upheld in *Louis vs. Ins. Co.* 71 Ia. 97.

Boyd vs. Ins. Co. 70 Ia. 325. *McCenra vs Ins Co*

Ross vs Ins. Co. 83 Ia. 586. *Holbrook Bros vs. Mill owners* 86 Ia. 255.

Cec. 2077 Ia. Code regulating R. R. fares upheld in *State vs. Chovin* 7 Ia. 204, *Law vs. R. R.* 32 Ia. 534. *Hoffbauer vs. R. R.* 52 Ia. 342.

Everett vs. R. R. 69 Ia. 15, *Curl vs R. R.* 63 Ia. 417.

Sec 2490 Ia. Code providing that coal operators shall not pay in script, check or anything but money, has not been declared invalid. See also *Mechem vs. Arkansas*, 211 U. S. 539.

Indiana Statute of Feb. 14 87 providing for bi-weekly payment in defiance of contract, upheld in *Hancock vs. Yaden* 23 N. E. 253 (Ind.)

Sec. 347 Code of Wis. providing that **the amount written in the policy**, shall be taken as the true value of the property, upheld in *Reilly et al vs. Ins Co.* 43 Wis. 489.

A similiar Missouri Statute, upheld in *White vs. Ins. Co.* 4 Dill. 177 *Central Law Journal* 1877. *Emery vs. Ins. Co.* 52 N. E. 322. *Chamberlain vs. Ins. Co.* 55 N. H. 249.

A similiar drastic insurance law in Ohio, reviewed and upheld in *Queen Ins. Co. vs. Leslie* 24 N. E. 1072.

Equitable Life Insurance society vs. Peters, 140 U. S. 226, 35 L. Ed. 497. Making initial carrier liable for loss or injury to goods in transit. *Smeltzer vs. Ry.* 158 Fed. 659. *Ry Co. vs. McCann*, 174 U. S. 580.

LEGISLATIVE DISCRETION

(e.) The legislature has a discretion vested in it, ordinarily to determine when an act is necessary in the exercise of the reserve and police power. The legislature is conclusively presumed to have made a thorough investigation as to the necessity of each statutory amendment.

Legal tender cases, 12 Wall 457, *Powell vs. Penn*, 127 U. S. 678, 32 L. Ed. 257. *Kiley vs. Ry.* 119 N. W. R. (Wis.) 309. *Watson vs. Ry.* 169 Fed. 947.

Muglar vs Kan. 123 U. S. 623; 32 L. Ed. 205.

People vs. Rudd. 117 N. Y. 7. *Charles Riverbridge vs*

Warren, 11 Pet. 605. Ohio Life Ins. Co. vs. DeBolt 16 How, 428. Mo. P. R. R. vs. Mackey 124 U. S. 205. Mo. vs. Louis 101 U. S. 22. Hayes vs. Mo. 120 U. S. 68. A. T. & S. F. R.R. vs. Matthews, 174 U. S. 104. Duncan vs. Mo. 152 U. S. 377. Merchant vs. R. R. 153 U. S. 380. K & W. R. R. vs. Pontius 157 U. S. 209. Low vs. Kansas 163 U. S. 81. Plezy vs. Ferguson 163 U. S. 537. C. & L. Turnpike Co. vs. Sanford, 164 U. S. 578. Jones vs. Brown 165 U. S. 180. West. U. Tel. Co. vs. Ind. 165 U. S. 304. C B. & Q Ry vs Chicago 166 U. S. 366. Holden vs. Hardy 169 U. S. 306. Saving and Loans society vs Multnoah, Co. 169 U. S. 421. Magoun vs. Ill. Trust and Savings bank, 170 U. S. 283. Tinsley vs Anderson 171 U. S. 101. A. T. & S. F. R. R. vs Matthews supra. M. & St. L. R. R. vs. Beckwith 129 U. S. 26 32 L. Ed. 587. Mo. Pac. vs. Hulmes 115 U. S. 465. Skinner vs Garnett Gold Mining Co. 96 Fed. 735 N. D. Cal. Daniels vs Hilliard 77 Ill. 650. Com. vs. Hamilton, 120 Mass. 383. Francis Barbier vs. Patrick Connely 113 U. S. 27. Soon King vs. Crowley 113 U. S. 703 28 L. Ed. 1145. State vs. Wilson 7 Kas. 428. Knoxville vs. Harbinson 183 U. S. 17.

(f.) It is the settled doctrine of the federal as well as state courts, that all powers not delegated to United States by the terms of the federal constitution and its amendments or prohibited by it to the states, are reserved to the states. Subject to the authority thus expressly or by necessary inference delegated to the federal government, the state has sovereign legislative power over all subjects, except such as are withheld from it by the constitution of the state itself.

McGuire vs. R. R. 131 Ia. 349. Hawkeye vs. French, 109 Ia. 588. New York vs. Miln, 36 U. S. 102, 9 L. Ed. 648. Watson vs. Ry. 169 Fed. 947. Ry. vs Castle 173 Fed. 841. R. R. vs. Dey 82 Ia. 312. In Re-Meador Fed Cas. No. 9375. Wadleigh vs. Devilling 1st Ill. App. 596. Moore vs. Veazie, 32 Me. 343. Beyman vs. Black 47 Tex. 558. Boyd vs. Ellis 75 Ia. 97. Stewart vs. Supervisors 30 Ia. pg. 9. Purzell vs. Smidt, 21 Ia. 540. Morrison vs. Springer, 15 Ia. 324. Boyer vs. Kinnick, 90 Ia. 74.

If under any possible state of facts the act would be constitutional and valid, the court is bound to presume that such condition existed.

Munn vs. Ill. 94 U. S. 113, 24 L. Ed. 77. State vs. Peckham 3 R. I. 289; In Re. 10 hour law 24 R. I. 603 (54 Atl. 602). McGuire vs. Railway 13 Ia. 350.

CLASSIFICATION

(g.) The mere fact that legislation is special, and made to apply to certain persons and not to others, does not affect its validity, if it be so made that all persons subject to its terms, are treated alike under like circumstances and conditions.

Hayes vs. Mo. 120 U. S. 68; 30 L. Ed. 578. Commonwealth vs. R. R. 187 Mass. 436. State vs Nelson 52 Ohio St. 88. People vs. Smith 108 Mich. 527. People vs. Wallbridge 6 Cow. (N. Y. 512) Dugger vs. Ins. Co. 95 Tenn. 245. Walston vs. Nevin 128 U. S. 578. Kane vs. R. R. 133 Fed. 681. Duncan vs. Mo. 152 U. S. 377, 38 L. Ed. 485. Herrick vs. R. R. 31 Minn. 11. R. R. vs. Herrick 127 U. S. 210. Zroadfoot vs. Fayetteville 121 N. C. 422. R. R. vs. Montgomery 152 Ind. 1. R. R. vs Paul 173 U. S. 404. State vs. Tower 185 Mo. Sup. 79. Holden vs. Hardy 169 U. S. 366. State vs Brown 18 R. I. 16. People vs. Bellapp 99 Mich. 151. McAunich vs. R. R. 20 Ia. 338. Kilpatrick vs. R. R. 74—— 288. Patterson vs. Endora 190 U. S. 169. R. R. vs. Mackey 127 U. S. 205. Hancock vs. Yaden 121 Ind. 366. Shaffer vs. — M. Co. 55 Mo. 74.

“An act is not open to the objection, that it denies to certain persons or classes the equal protection of the law if all persons brought under its influence are treated alike under the same conditions.”

R. R. vs. Hackey 127 U. S. 205, 32 L. Ed. 107. See also Kiley vs. Ry. 119 N. W. R. 309 Wis. Tullis vs. R. R. 175 U. S. 348. People vs. Hadnor 149 N. Y. 205. Mo. vs. Louis 101 U. S. 22, 25 L. Ed. 149. Pierce vs. Van Dusen 78 Fed. 693. Duncan vs. Mo. 152 U. S. 377, 38 L. Ed. 485. Watson vs. Nevin, 128 U. S. 578, 32 L. Ed. 544. Giozza vs. Tierman 148 U. S. 657, 37 L. Ed. 1031. R. R. vs Crider 91 Tenn. 501. Butte vs. Paltrovich 30 Mont. 18.

The courts have upheld statutes depriving railway companies of the benefit of the fellow servant doctrine.

Herrick vs. Railway 31 Minn. 11; R. R. vs. Mackey 127 U. S. 205, 32 L. Ed. 107. Railroad vs. Herrick 127 U. S. 210,

32 L. Ed. 109|

Likewise a statute requiring the railroad to pay to the land owner attorneys fees in condemnation proceedings.

Gano vs. R. R. 114 Ia. 719 L.

Likewise the statute subjecting railway properties to double damages, in certain cases.

Railway vs. Humes 115 U. S. 512. R. R. vs. Beckwith 129 U. S. 26-32 L. Ed. 585.

Likewise the statute denying railway corporations the right of appeal from assessment for taxation, a requirement not made in the case of individuals.

Railroad vs. Backus 154 U. S. 421.

Likewise the statute making railroads liable for fires set out by engines as suggested in another connection, supra, R. R. vs. Matthews supra.

Likewise the statute requiring railroads to pay without discount to a discharged employee, wages theretofore earned by him, at the time of the discharge.

R. R. vs. Paul 173 U. S. 704. See also R. R. vs. Gritierez 215 U. S. 87

The Temple amendment under consideration, was properly enacted in the exercise of the police power residing in the state of Iowa at the time it was exercised.

Munn vs. People of Ill. 94 U. S. 113: Barron vs. Baltimore 32 U. S. 293. Slaughter House cases 83 U. S. 36: Ex part Davis 21 Fed. 396. R. R. vs. Day 82 Ia. 344: Shelley vs. St. Charles Co. 17 Fed. 210. Farmers Loan and Trust Co. vs. Stone 20 Fed. 273. Sarony vs. Burrow Gills Lith. Co. 17 Fed. 591: 20 Wall 655.

McAunich vs. R. R. 20 Ia. 343: Pepp vs. R. R. 36 Ia. 52. Ia. Med. College Assn. vs. Shraider 86 Ia. 668: Mo. Pac. R. R. vs. Herrick 127 U. S. 210: Mo. Pac. vs. Humes 115 U. S. 512: Barbier vs. Connely 113 U. S. 27: Soon King vs. Crowley 113 U. S. 703: Miller vs. C. B. & Q. R. R. 65 Fed. 305: Holden vs. Hardy 169 U. S. 42. Jones vs. R. R. 161 Ia. 6: Welsh vs. R. R. 53 Ia. 632: M. & St. L. R. R. 129 U. S. 26: Brush vs. R. R. 43 Ia. 554: Davis vs. R. R. 83 Ia. 744: Lucas vs. R. R. 112 Ia. 594: McCune vs. R. R. 52 Ia. 602: Rose vs. R. R. 39 Ia. 246: Solon vs. R. R. 95 Ia. 260: Cen. Trust vs. Stone 65 Ia. 656: Rodymaker vs. R. R. 41 Ia. 297: Small vs. R. R. 50 Ia.

388: St. L. & S. F. R. R. vs. Matthews 165 U. S. 1: Dayton Coal Co. vs. Barton 183 U. S. 23: Barron vs. Burnside 121 U. S. 18 6: Loughton vs. Steel 152 U. S. 133: Litchfield Coal Co. vs. Taylor 81 Ill. 500: Commonwealth vs. Alger 7 Cush. 53: Commonwealth vs. Hamilton M. Col. 20 Mass. 283: Commonwealth vs. Hamilton Mfg. Co. 169 U. S. 393: Avent B. Coal Co. vs. Com. of Ky. 28 L. R. A. 273: Knoxville Iron Co. vs. Harbarson 183 U. S. 13: G. C. & S. F. R. R. vs. Ellis 165 U. S. 150.

(a) This Court in analogous situations, has refused to declare the acts in question unconstitutional.

Davison vs. New Orleans 96 U. S. 97: R. R. vs. Humes 115 U. S. 512: Barber vs. Connolly 113 U. S. 27: R. R. vs. May 194 U. S. 267: Ins. Co. vs. Dobney 189 U. S. 301.

(b.) The right of contract, like others possessed by individual members of society, is held subject to such reasonable restrictions and regulations as may be imposed for the public good.

Words and Phrases, Vol. 6 pg. 5, 424.

Police power is but another name for that portion of the sovereignty of the state not surrendered by the terms of the National compact; while protection of public health and public morals and the promotion of social order are peculiarly within its province, these are but instances of its application, and do not limit its sphere of action.

People vs. Budd 117 N. Y. 1: Barber vs. Connolly 113 U. S. 27.

It comprehends all those general laws of internal regulations necessary to secure peace, good order, health and prosperity of the people and the regulation and protection of property and property rights.

State vs. Harrington 68 Vt. 622: State vs. Reynolds 58 Atl. 755 (Conn.).

As soon as any part of a person's conduct, affects pre-judicially the interest of others society has jurisdiction over it.

Mill on liberty Chap. 4: Powell vs Commonwealth 114 Pa. 265: Oil City vs. Trust Co. 151 Pa. 454: Crowley vs. Christenson 137 U. S. 89: Jamison vs. Oil Co. 128 Ind. 566: Barrett vs. Mayer 47 La. Ann. 630: Stone vs. Miss. 101 U. S. 14: State vs. Tower 185 Mo. Sup. 79.

(c.) The courts are not at liberty to declare an act void merely because in their judgment it is opposed to the spirit of the constitution. **They must be able to point out the specific provision**, expressed or clearly implied from what is expressed, which the act violates.

Cooley's Constitutional Limitations, Chapter 7.

Winter vs. Jones 10 Ga. 190.

(d.) It is a settled proposition that the 14th amendment to the federal constitution was not intended to limit or hamper the states in the exercise of their police powers.

Mugler vs. Kansas 123 U. S. 623: In-Re Kennler 136 U. S. 436. Ex Parte Converse 137 U. S. 624: Powell vs Penn. 127 U. S. 678.

Referring to a similar inactment the Minnesota Supreme Court says: "It is a police regulation intended to protect life, person, and property by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies."

Mikkelson vs. Truesdale 63 Minn. 137 (65 N. W. 260.)

The Ohio Supreme Court in reviewing a similiar statute has said that the liability is not created for the benefit of the employees alone, but has its reasons and foundation in **public necessity and policy**.

R. R. Co. vs. Spangler 44 O-St. 471 (8 N. E. 467.)

Kane vs. R. R. 133 Fed. 681.

Congress may make invalid any contract, by which the soldier agrees to pay more than a certain fixed sum to his attorney for assistance rendered in establishing his right to the benefit thus created, and even make it a crime for the attorney to demand or receive more than a statutory fee, even though he demands or receives no more than he has reasonably earned

Frisbie vs. U. S. 157 U. S. 160 (39 L. Ed. 657.)

(e.) Employer and employee do not stand in the same relative position, which they occupied before the various lines of industry became concentrated in comparatively few hands, and before workers were marshalled into such vast armies, that employers must of necessity deal with them in masses, rather than individuals.

These changes have not been accomplished without serious friction between wage payers and wage earners. The con-

dition has existed, and still exists, and neither the legislature nor courts can with propriety ignore it.

McGuire vs. R. R. 131 Ia. 361.

Strikes and lockouts in these great concerns, or the tying up for a single day of one railroad system, is attended by grave inconvenience and loss to the public, while anything like a general suspension of traffic is productive of immediate and wide spread calamity. **So close and vital is the dependence of the public welfare upon the harmony between labor and capital, that the legislature may well exercise a liberal discretion in the enactment of measures to suppress and guard against every influence which tends to promote discontent or discord between them.**

McGuire vs. R. R. 131 Ia. 361.

Among the legislative measures recognizing the propriety if not the necessity of laws for the protection and promotion of the interests of labor, may be mentioned those **upheld by the courts**, providing for the establishment of bureaus of labor preference to claims for labor in the settlement of solvent estates, for laborers liens, for the employers liability for personal injuries, for the screening and weighing of coal as a basis of miners wages, for compulsory payment of wages at frequent or regular intervals, limiting the hours of labor, allowing attorneys fees in accidents for the recovery of wages, forbidding the payment of wages in store orders, or other paper not redeemable in money, in invalidating the assignment of wages before they are earned. These are but a few instances of many similiar statutes, passed by the legislature and congress and upheld.

McGuire vs. R. R. 131 Ia. 361.

Ordinarily the laborer "must work where they are working, and keep their job at all hazards if they would not bring themselves and their families to want. To say to such 'if you do not like the conditions you may quit' is often only a heartless mockery."

R. R. vs. Kilpatrick 74 Vt. 288 (52 Atl. 531.)

(f.) The argument that such statutes deprive the laborer himself of the liberty of contract, is not valid, "such argument is fallacious in the case of a wage contract where the voluntary assumption by one may, through stress of com-

petition, force others to assume the burden against their will."

Freund on Police Power 500-503: See also Keeting J., in Archer vs. James, 2 Best and S. 73, and Byles, J. in same case page 82.

The opportunities of the employer and employed are not equal, they are not on the same footing, and sooner or later the employed must accept the terms of the employer, where no statute intervenes, so holds the Indiana Supreme Court, in upholding a similiar statute.

Handcock vs. Yaden 121 Ind. 366 (23 N. E. 255.)

(g.) The right of the state to regulate liberty of contract is peculiarly applicable to corporations. That corporations are entitled to the protection of the law is not doubted, **but this does not mean that corporations and natural persons stand in the same relation** to the power which inheres in the state to regulate their conduct or method of business. The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights, for which he is not indebted to organized societies. He is born to them. **The corporate person has no rights except those with which it is endowed by the law making powers, and the power of creation necessarily implies the power of regulation.**

R. R. vs. Bristol 151 U. S. 556 (38 L. Ed. 369): R. R. vs. Paul 173 U. S. 404 (43 L. Ed. 746): R. R. vs. Matthews 174 U. S. 96 (43 L. Ed. 909): Hooper vs. California 155 U. S. 648 (39 L. Ed. 297): Ind. Co. vs. Daggs 172 U. S. 557 (43 L. Ed. 552): Dayton vs. Iron Co. 183 U. S. 23 (46 L. Ed. 61): Ins. Co. vs. Needles 113 U. S. 574 (28 L. Ed. 1084): Seeking Fund cases 99 U. S. 700 (25 L. Ed. 496): Herriek vs. R. R. 31 Minn. 11 (16 N. W. 413): State vs. Brown 18 R. L. 16 (25 Atl. 246): R. R. vs. Lyon 123 Pa. 140 (16 Atl. 607): State vs. Peel S. C. Co. 36 W. Va. 802 (15 S. E. 1000): R. R. vs. Paul 64 Ark. 83 (40 S. W. 705): Tullis vs. R. R. 175 U. S. 353 (44 L. Ed. 192): Skinner vs. Barnett 96 Fed. 735 (C. C.) U. P. R. R. vs. M. C. R. R. 128 Fed. 238: Commonwealth vs. R. R. 129 Pa. 324: Iron Co. vs. Harbison 183 U. S. 13 (46 L. Ed. 55): Street R. R. vs. Sioux City 78 Ia. 746.

(h.) The fact that the corporation is the creature of another state, cuts no figure in the determination, as to whether regulating acts are valid or not.

Hooper vs. California 155 U. S. 648 (39 L. Ed. 297): Ins. Co. vs. Daggs 172 U. S. 557 (43 L. Ed. 552): Dayton vs Barton 183 U. S. 23 (46 L. Ed. 61).

The local statutes pertaining to the duty to fence tracks imposing liability for live stock killed by moving trains, or damage by fire set out by engines, regulating speed within city or yard limits, abolishing the fellow-servant rule, requiring the redemption of unused tickets, and regulating contracts of employment are no less applicable to foreign corporations engaged in inter-state commerce than to domestic corporations during only a local business.

Smith vs. Alabama 124 U. S. 465 (31 L. Ed. 508): R. R. vs. Alabama 128 U. S. 96 (32 L. Ed. 352): Wilfong vs. R. R. 116 Ia. 551: R.R.vs. Murphy 116 Ga. 870 (43 S. E. 265): R. R. vs. New York 165 U. S. 631 (41 L. Ed. 853): State vs. R. R. 133 Ind. 85: Geer vs. Conn, 161 U. S. 519 (40 L. Ed. 793): R. R. vs. Bolan 169 U. S. 133 (42 L. Ed. 688.)

A Maryland statute requiring coal operators to pay in money at stated intervals and restricting the right to contract for the payment of such wages in merchandise has been upheld

Schafer vs. U. M. Co. 55 Md. 74.

A similiar statute in Indiana has been upheld.

Handcock vs. Yaden 121 Ind. 366.

The same court has also sustained the validity of a statute which prohibits the assignment of claims for wages not yet earned.

International Co. vs. Weissinger 160 Ind. 349 (65 N. E. 321).

This Supreme court has upheld the statute of congress making it unlawful to pay any seaman wages in advance, or to pay such wages to any other person on a seamans account and providing that such payment in advance shall not absolve the employer from full payment after the wages have been earned. It is held not to invade any right guaranteed by the 14th amendment.

Patterson vs. Eudora 190 U. S. 169 (47 L. Ed. 1002.)

Statutes have been sustained which invalidate contracts to waive homestead and exemption laws.

Curtiss vs. O'Brien 20 Ia. 376: Kneetle vs. Newcomb 22 N. Y. 249: Maloney vs. Newton 85 Ind. 365.

A debtor cannot waive stay of execution by contract.

McClain vs. Elner 4 Ind. 239.

Parties may be required to insert the words "Given for a patent" in promissory notes given upon such consideration.

New vs Walker 108 Ind. (9 N. E. 386): Herdie vs. Roesler 109 N. Y. 127.

Parties may be prohibited from contracting to pay attorneys fees for the collection of a claim against them.

Churchman vs. Martin 54 Ind. 380.

In Vermont it has been held that a contract which forbids a railway employee to contract to assume the risk of hazardous appliances or an unsafe place to work is not unconstitutional.

Kilpatrick vs. R. R. 74 Vt. 288 (52 Atl. 531.)

The Massachusetts Supreme Court has held that the act requiring laborers to be paid money in weekly installments could be legally extended to private persons or partnerships, and that such legislation would not be in violation of any constitutional guarantee.

Re House Bills No. 1230, 163 Mass. 589 (40 N. E. 113).

This court has held that a provision prohibiting all sales of corporate stocks to be delivered in the future, is not a violation of the 14th amendment, although its prohibition includes bonafide as well as gambling transactions.

Otis vs. Parker 187 U. S. 606 (47 L. Ed. 323.)

This court sustained an act making it unlawful for any contractor engaged upon a work of public improvement to require or permit an employee to work more than eight hours per day.

Atkin vs. Kansas 191 U. S. 207 (48 L. Ed. 148.)

As commenting on the extent to which the Police Power may restrict the liberty of contract we call attention to Jacobson vs. Massachusetts 197 U. S. 11: Northern Securities case 193 U. S. 197: Re House Bill 147, 23 Colo. 504: White vs Reservoir Co. 22 Colo. 191: Cook vs. Howland 74 Vt. 393: Commonwealth vs. Newman 164 Pa. 306: Commonwealth vs. Mfg. Co. 120 Mass. 385: Waters-Pierce Oil Co. Texas 212 U. S. 86: Smiley vs. Kansas 196 U. S. 447: McLean vs Ark. 211 U. S. 539: Sweeny vs. Hunter 145 Pa. 363: Kriebohm vs. Yancey 154 Mo. Sup. 67: Naglebaugh vs. Harter 21 Ind. App.

551: State vs. Crescent Co. 83 Minn. 284: State vs. Moore 104 N. C. 714: Richardson vs. R. R. 149 Mo. Sup. 311: State vs. Wagner 77 Minn. 483: Firmston vs. Mack 49 Pa. 387: Etton vs. Keegan 114 Mass. 433: Davis vs. State 68 Ala. 58:

Act of Congress June 26th, 1884, (23 Statute 53, Chap. 121), construed in case of the Edman (D. C.) 23 Fed. 255. Higgins vs. Graham 143 Cal. 131: Bowlley vs. Cline 28 Ind. App. 659: Hurdy vs. R. R. 162 N. Y. 49: Wheeler vs. Russle 17 Mass. 258: Karns vs. Ins. Co. 144 Mo. Sup. 413: Breckbill b. Randle 102 Ind. 528: Buttler vs. Chambers 32 Minn. 71: Graham vs. Lumber Co. 26 Ky. Law 70: Hotel vs. A. B. Co. 54 C. C. A. 165 (116 Fed. 793): Munn vs. Ill. 94 U. S. 113: R. R. vs. Wilson 4th Wilson, Civcaset. App. (Tex.) 568: Booth vs. Ill. 184 U. S. 425: Skinner vs. Garrett M. Coal (C. C.) 96 Fed. 735: Garrett vs. W. U. Tel. Co. 83 Ia. 257: Miller vs. R. R. (C. C.) 65 Fed. 305: Square vs. Tellier 185 Mass. 18: Carroll vs. Ins. Co. (U. S.) 26 Sup. Cp. 68 (50 L. Ed.): State vs. Wilson 61 Can. 32: Warren vs. Sohn 112 Ind. 213: Riley vs. Ins. Co. 43 Wis. 449: Ins. Co. vs. Leslie 47 O. 409: Walp vs. Lanmkin 76 Conn. 515: State vs. Reynolds (Conn.) 58 Atl. 755:

(i.) An organization may do an insurance business without being an insurance company within the meaning of the statute, but it is the nature of the business rather than the form of the organization by which it is carried on, which justifies the state in exercising supervision over it.

Martin vs. Stubbing 126 Ill. 387: Burlington vs. White 41 Neb. 662: Grimes vs. Legion of Honor 97 Ia. 315: State vs. Miller 66 Ia. 26.

A similar act was upheld in Pierce vs Van Dusen 78 Fed. 693 thereby discrediting and repudiating Shaver vs. R. R. 71 Fed. 931 and Railway Co. vs. Cox 45 N. E. 641.

(j.) Under the reserve power of the State to regulate and control corporations and to amend charters, it has often been held that whatever regulation or restriction might lawfully have been included in the regular charter, may be imposed by subsequent legislation.

Sinking Fund cases 99 U. S. 700 (25 L. Ed. 496.)

R. R. Co. vs. Sioux City 78 Ia. 746: R. R. Co. vs. Williams 103 Ky. 348 (45 S. W. 229): Stanislaus vs. San Joaquin 192 U. S. 312 (48 L. Ed. 406).

(K) It is the settled doctrine of our courts that as special legislation affecting the rights and liabilities of railroad companies or a distinct class or kind of corporations, does not constitute a denial of the equal protection of the laws, simply because the same regulation or restriction is not extended over other corporations or other kinds of business.

R. R. vs. Matthews 165 U. S. 1: Tullis vs. R. R. 175 U. S. 348: R. R. vs. Pontius 157 U. S. 209: R. R. vs. Paul 173 U. S. 404: Ins. Co. vs. Daggs 172 U. S. 557: Fidelity vs. Mettler 185 U. S. 308: Duncan vs. Mo. 152 U. S. 377: R. R. vs. Blackus 154 U. S. 421: R. R. vs. Herriek supra: R. R. vs. Beckwith 129 U. S. 26: R. R. vs. Duggan 109 Ill. 537: R. R. vs. Dey 82 Ia. 312: Gano vs. R. R. 114 Ia. 719: Cameron vs. R. R. 63 Minn. 384: R. R. vs. Simonson 64 Kan. 802: Ins. Co. vs. Dobney 189 U. S. 301: Ins. Co. vs. Louis 187 U. S. 335: Campbell vs. R. R. 121 Mo. 340: State vs. Nelson 52 Ohio 88: R. R. vs. May 194 U. S. 267: R. R. vs. Snell 193 U. S. 30.

(1.) The employers liability act, an act of congress of June 11th, 1906, contained a clause substantially the same as is the Temple amendment, but this court while holding the act unconstitutional, did not base its action on said provision, nor do we find any suggestion in the opinion of the court that said provision as to insurance etc., would be regarded as an infraction of any constitutional provision.

Ill. Central R. R. et al vs. Howard 207 U. S. 463.

And was held constitutional in part in Ry. vs. Gatzert 215 U. S. 87.

The act of April 22, 1908, was held constitutional in Watson vs. Ry. 169 Fed. 942.

Walsh vs. Ry. 173 Fed. 494.

Smeltzer vs. Ry. 158 Fed. at 669.

ARGUMENT

Prefatory

We call the court's attention to the Supreme Court of Iowa's opinion in the instant case below:

McGuire vs. the C. B. & Q. R. R. 131 Ia. 340.

This able opinion will doubtless challenge the attention of students of the law, and the membership of this distinguished tribunal of last resort, will be no exception, for im-

partial readers would not regard it as aught else, than a great treatise on this most important subject, showing a vast amount of research. **We especially request this court's careful pursual of the same, as it is the first decision of any court that is squarely in point on the matters here involved.** It has greatly aided us in the preparation of our brief.

EMPLOYERS LIABILITY ACT CASE

Your decision entitled, *Howard vs. the Ry.* 207 U. S. 463 (52 L. Ed. 297) we think goes a long way in establishing our contentions here urged, not so much on account of the matters expressly in words decided, as of the propositions affirmed by reason of not being spoken of at all.

The act of Congress of June 11th, 1906, Sup. to Fed. Stats. annotated P. 68 in Sec. 3, is in substance **precisely** the same as the "The Temple Amendment," which is the subject of attack in the instant case, yet in your opinion affirming unconstitutionality in one respect, there is no hint or suggestion that Sec. three, relating to the "Relief" contracts and the effect of accepting benefits after an accident, is an infraction of any constitutional requirement.

The same provision was engrafted in the second act of April 22, 1908, (Chap. 149, 35 Stat. L. 65).

Again, the fact that the two houses of the Congress of the U. S. have thus concurred in two enactments **in effect condemning** such schemes as we see exploited in this Burlington Relief Department, doubtless after thorough investigation, would be according to many of your cases, entitled to great weight in the determination of the question as to whether this Relief Department is an **undiluted blessing** or an inequitable institution, requiring regulation by legislative acts in the interest of the operating class.

It is disclosed by the argument of the counsel for the company that reliance is had on the position that the Temple Amendment is invalid, because contravening the provisions of the United States' Constitution, as contained in the Fourteenth Amendment and Sec. one thereof. By reference to the sections referred to, we find that there is a prohibition on all states (a) making or enforcing any law which abridges the privileges or immunities of the citizens of the United States

(b) depriving any person of life, liberty or property without due process of law; (c) denying to any person within its jurisdiction the equal protection of the law. The claimed infraction of the United States Constitution, in this case, as is seemingly claimed by counsel, narrows itself down to the three propositions; (1) Depriving defendant of its liberty, by reason of abridging its right to contract; (2) Denying it the equal protection of the law; and, (3) as seemingly claimed by counsel, in giving to certain classes of citizens "privileges and immunities, which, upon the same terms," are not granted to the defendant company.

Each of these distinct propositions are usually raised in this kind of a case, where constitutional questions of a like kind and character are raised and discussed, and they are all treated together in the decision applicable thereto, and, hence, in this argument we will consider them together in our discussion of this case; and in such consideration as we deem necessary to give to the company's counsel's arguments, our position being briefly stated, that the Temple Amendment is **not** unconstitutional, as being opposed to any provisions of the United States Constitution, in that it **does** have a general and uniform application; in that it **does not** grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, are not granted to all citizens within the same proper and rationally classified class; in that it **does not** abridge the legitimate liberty of the defendant company to contract; and, further, in that it **does not** deny to the defendant the equal protection of the law.

Prior to the enactment of Chapter 49 of the 27th General Assembly, the law as it stood, section 2071, made railroad companies liable for injuries to its employees engaged in the actual operation of a railroad, even though the negligence was not the company's negligence, or the negligence of a vice-principal, but simply the negligence of a fellow-servant, the section providing that "no contract which restricts such liability shall be legal or binding." Thereupon, the section being upheld by the courts, the larger corporations sought some way to defeat the spirit, if not the letter, of this enactment of the Iowa legislature, after the defendant company, and many other large railroad corporations, had demonstrated that

it could not be set aside as unconstitutional, by arguments similarly specious, and just as able, and apparently, just as sincere, as the able production which has been submitted by the company's attorneys.

After the court of last resort had held that section 2071, as we have it now, was constitutional, then and thereupon appears this very innocent looking individual, which is known as the Relief Department, in this case called "the Burlington Relief Department," by the regulations of which it is provided that an employee entering the service could make a contract with his employer, by the terms of which if the employees would pay his regular quota of dues (which, in itself, would entitle him to benefits of some kind or nature,) that the employee could bind himself **in advance**, that if he became injured in the train service, and accepted what would be rightfully his **any way, having paid for it**, that that would debar him from recovering one cent of damages at law, no matter how grave and enormous his injuries might be; in other words, speaking in a line of these very regulations we have before us, binding himself in advance, that if, after paying his dues for 15 years, yet if at the end of 15 years one-half of his foot was cut off, but not "at above the ankle" (See regulation No. 46,) that if he accepted for such grave injury a pittance of \$1.50 per day for 52 weeks, and 75c a day for awhile longer, that such acceptance of such insignificant daily benefits would be a complete bar to his recovery of substantial damages somewhat commensurate to the injury sustained. (It is understood, that the amount sued for was placed at \$2000, not that such sum would in itself be at all adequate but with the thought to avoid the impossible, expensive litigation in the Federal Courts.)

Before the legislature had got along to the point of addressing themselves to the task of framing some law that would be adequate to prevent this great injury and injustice, which the companies by reason of their superior advantage over their helpless employees, were perpetrating on those who were dependant on them for their support and maintenance, two cases came before the Iowa Supreme court, i. e. Donald vs. The Chicago, Burlington & Quincy Railroad Company, 93 Ia. 284, and Maim vs. The Chicago, Burlington &

Quincy Railroad Company, 109 Ia. 260 in which cases, we take it, a complete copy of the regulations was not before the court, and in which cases the court seemingly hold that, so far as they could get insight into the scope of the regulations, in their then form, they were not, particularly, inequitable, and therefore, "not opposed to public policy." It will not be forgotten that these regulations radically change from time to time.

Thereafter the legislature of the state, very evidently addressed themselves to the task of curing this evil, and by the exercise of the power reserved in them over corporations in the state, and also, in the legitimate exercise of its sovereign police powers, i. e., the power inherent in it to govern its subjects or citizens, the so-called Temple Amendment was enacted, and the question here is, as to whether it shall be upheld.

The section, as it stood, affirmed "no contract which restricts such liability shall be legal or binding." Then follows this amendment: "Nor shall any contract of insurance, relief, benefit or indemnity in case of injury or death, entered into **prior** to the injury between the person so injured and such corporation, or any **other** person or association acting for such corporation, nor shall the **acceptance** of any such insurance, relief, benefit or indemnity by the person injured * * * *after the injury * * * * constitute any bar or defense to any cause of action brought under the provisions of this section."

In the case at bar the company is claiming that because Mr. McGuire accepted benefits for less than 52 weeks without **any contract whatever made with him after the injury**, that such **acceptance** bars his right of recovery. The Temple Amendment says it will **not** bar his right to recover. Here is the issue, a square conflict, and it cannot be avoided. It is true that the later part of the Temple Amendment leaves a way **open** to the employer and employee to, by contract made **after the injury**, to make a settlement and adjustment for the injury received; but, in the case at bar, it is not claimed that the company entered into any contract whatever with McGuire for a settlement of his injuries **after** his injuries were received, the sole claim being that his **acceptance of benefits**

is a bar to his right to recover, in view of the provisions of the regulations which provide that **"if a member"** accepts the benefits it shall bar his right to afterwards bring suit to recover substantial damages.

The railroad company, with nice precision, had estimated the very amount which its employees should pay in order to make the necessary fund to pay the injuries as they might occur (incidentally including nothing in said benefits for the payment of clerk hire and the like, inasmuch as the clerical work **is imposed upon the ordinary employees of the company** as is a matter of common knowledge, without extra compensation, or without any extra outlay on the part of the company,) that therefore, if an employee was injured he would be entitled to his benefits because he had paid for them; and the railroad company would have no right to make him contract in advance that he would relieve the company from the result of their negligence, **provided**, in the case of the injury he **accepted benefits, which were rightfully his in any event** We state as a reason why the court below should be sustained.

First, the regulations are in conflict with the Temple Amendment, which is constitutional, as having been passed within the proper exercise of the reserved as well as the police power of the state, with which any sovereign or independent state is always clothed; **second**, that in no event can the regulations be held to apply to, and curtail the plaintiff's right to recover in this case, for the reason that the plaintiff, according to the express language of the regulations, is not a **member** of the Burlington Relief, and not claimed to have been such by the company, and not subject to the provisions of section 44 of the regulations, which only provides that the acceptance by **"members"** of the benefits shall be a bar to any right to prosecute his claim for damages; **third**, because the regulations, disclosed in the appellant's abstract show that they are unconscionable, oppressive, disposed to deal with employees in unequal terms, disclosed that they give no benefits to the employees, except such as he had paid for by his contributions, and against public policy, which will be more definitely pointed out hereafter in this argument as being against public policy, void, and not binding on this plaintiff.

I

The Temple Amendment is not in violation of the Federal constitutions, but was passed in the rightful exercise of the power reserved and vested in the legislature branch of the government, of the state of Iowa

RESERVE POWER

Corporations are creatures of the state, but for whose enactments they could not, legally, come into existence. They possess many powers not enjoyed by the private individual. In the case of railroad corporations they are quasi-public corporations, and, as such, are vested with many powers not enjoyed by either individuals or other corporations, which are very wide and comprehensive and almost sovereign in their nature. While it is true that the state gives them their being, and these powers, yet the state reserves a right of reasonable control, both as to their character, regulation or the continuance of powers therefore granted them.

There have been few constitutions adopted since the opinion of Judge Story in the celebrated Dartmouth College case, but what contain an express reservation in favor of the state, to regulate the use of the power of the corporation granted to them by the state. The constitution of Iowa was no exception, for in Article 8, section 12, it is provided: "The General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities by a vote of 2-3rds of each branch of the General Assembly." It is a matter of history and common knowledge that this Temple Amendment was passed by the legislature unanimously. As supplementing this constitutional reservation, the legislature enacted section 1619 on the same line, which, proceeds more in detail as to the reserve power of the state to control the exercise of the powers granted to corporations.

Section 1619—Legislative control: "The articles of corporations, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times, be subject to legislative control, and may be, at any time, altered, abridged or set aside by the law, and every fran-

chise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to the conditions imposed upon the enjoyment thereof, **whenever** the General Assembly **shall deem** necessary for the public good."

By a causal reading of the foregoing it is readily observed, (a) that such corporations are subject to regulation by the state; and (b), that it is a matter of legislative discretion as to when, and in what manner such regulations shall take place.

These constitutional and legislative requirements have passed under judicial review in many important cases, determined both in state and federal courts to some of which we desire to refer. We cite

Sioux City Ry. Co. vs. Sioux City, 78 Ia. 371 and

Sioux City Ry. Co. vs. Sioux City, 78 Ia. 746.

Referring to the case just cited, under the statute of the state and the ordinances of the defendant city, when plaintiff railway company assumed its corporate franchise and authority to construct its railway was conferred upon it, it was required to pave between the rails of its railway and no more. By a subsequent statute and ordinance the additional requirement to pave one foot outside of its track was imposed upon it. It was claimed by the Street Railway Company that such additional imposition of one foot on the outside of the rails was unconstitutional, and an impairment of a vested right under a contract. Beck, J., in delivering the opinion of the court at page 370, says:

"The controlling question in the case involves the validity of this legislation by the state and city. Prior to the corporate organization of plaintiff, and the action of the city, brought in question in this case, code section 1090 (the same as 1619 of the code of 1897) was enacted, and continues to be in force. It is in the following language: (here is set out the section of 1090 in former code.) Counsel for plaintiff do not deny that if the legislation in question pertains to or effects the rights and powers conferred by the articles of incorporation—what is called the franchise—of plaintiff, it is authorized by the section of the code just quoted. Indeed, that could not well be denied, for by the legislation authorizing the alteration and abridgement of the rights and powers—

the franchises—the plaintiff's rights became a part of its charter, and was an express limitation upon its franchises. But counsel insist that the obligation of the plaintiff to construct pavements was imposed by a contract between the plaintiff and the city. We have said that the correctness of this proposition may be assumed for the purpose of the discussion in hand. * * * * * By the contract relied upon by counsel the plaintiff binds himself to pave between the rails, but the city does not bind itself not to exercise the authority, conferred upon it by code, section 1090, to impose, other conditions upon the exercise of plaintiff's authority and rights, its franchise—which, **in the judgment of the city**, may be required for the public good."

And, in the second case cited, in 78 Ia. 746, being an action brought by the same street railway company to test the legality of a special tax levied on the street railway company to pay for the additional paving, that is, one foot on the outside of either rail, said court, Reed, J. delivering the opinion of the court at page 745, says:

"In our opinion the case turns upon the question whether the state had the right under its **reserved power** to impose the additional burden upon the plaintiff. When the plaintiff became incorporated the following statute was in force: (Here the court sets out section 1090, now 1619 of the code, as to the state's reserve power over corporations.) The section occurs in the chapter relating to corporations for pecuniary profit to which class of corporations the plaintiff belongs. That the state in granting a charter to a corporation may reserve to itself the power to repeal or amend the same and that it may exercise such reserved power, is well settled. *Sherman vs Smith*, 1 Black. 587; *Miller vs State*, 15 Wall. 478; *Holyoke Co. vs Lyman*, 15 Wall. 500; *Sinking Fund Cases*, 99 U. S. 700. By the provision quoted above the state reserved the power, not only to repeal or amend the articles of incorporation of such corporations as should be organized after its enactment, but to impose such conditions upon the enjoyment of the franchises obtained thereunder as the **General Assembly** might deem necessary for the public good. Plaintiff's franchise consists in privileges, powers and rights conferred upon it by the state, by the statute. The

reservation was a condition of the grant."

On appeal to the Supreme Court of U. S. the case just quoted from, was affirmed in 138 U. S. 98, 34 L. Ed. 899. We quote at page 101, of L. Ed. 901, from the opinion of Justice Blatchford.

"The company took its franchise subject to such regulations as the state might enact. This is plain from the provision of section 1090 of the Code. The company took its charter subject to the provisions of that section. The General Assembly **deemed it necessary for the public good** to require street railways to pay for the paving of one foot outside of the tracks, presumably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company * * * under section 1090 of the Iowa Code, the legislature had the authority not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the General Assembly **might deem necessary for the public good**. The **reservation** of this power was a condition of the grant. The city counsel could make no arrangement with the company which would not be subject under that section to the superior power of the General Assembly * * * * The state reserved the power to regulate such franchise and impose conditions upon it. * * * * No question can arise as to the impairment of an obligation of a contract, when the company accepted all of its corporate powers subject to the **reserved** power of the state to modify its charter, and to impose additional burdens upon the enjoyment of its franchise."

The question came up as to the reserve power of the state to fix and regulate water rates and charges in the case of the City of Des Moines vs Des Moines Water Works Company, and the Des Moines Water Works Company vs City of Des Moines, two cases tried together, and reported in the 64th N. W. Rep. 269.

In that instance this reserve power of the state was recognized, to regulate the rates for water. Romrock, J. in delivering the opinion of the court at page 274, says:

“There is no doubt of the power of the state to regulate the compensation to be paid to corporations in the exercise of a public service or employment, in the absence of any schedule of prices fixed, by an arrangement, in the nature of a contract. This right has again and again been sustained, in numerous cases determined by the Supreme Court of the United States, as applicable to railroad freights and charges, and to persons and corporations engaged in other public service.”

In *Holyoke Water Power Company*, plaintiff in *Err. vs Theodore Lyman et. al.*, *Commissioners on Inland Fisheries*, etc., 82 U. S., 500 21 L. Ed. 139, the question was as to the power and control of a state, reserved, to regulate the affairs of water companies, making provisions in its dams for the free passage of fish and etc. and it was held that the plaintiff corporation took its rights and grants from the state subject to this reserve power on the part of the state to regulate the exercise of the power granted. Quoting from Justice Clifford's opinion at page 507 L. Ed. 139:

“It is clear that the power may be exercised and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and the corporators, or to promote the due administration of the affairs of the corporation.”

And, again, at page 508:

“Power to legislate, founded upon such a reservation, is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted, subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature **may deem necessary** to secure either the object of the grant or any other public right not expressly granted away by the charter. *Com. on Fisheries vs Holyoke Co.*, 104 Mass. 451.”

In *Central Pacific Ry. Co. vs Gallaton*, 99 U. S. 727, 25 L. Ed., 505, known as the “Sinking Fund Cases,” this question of reserve power of a state over corporations was fully discussed as relating to the power of congress to legislate and control such corporations, and amend its charters and the

like; and we have here, in an able opinion by Waite, C. J. the announcement of the same familiar doctrine in this case as applied to the reserve power of congress. Quoting at page 728.

"Under this legislation we are of the opinion that, to the extent of the powers, rights, privileges and immunities granted these corporations by the United States, Congress retains the right of amendment and in that way regulates the administration of the affairs of the company in reference to the debts created under its own authority in a manner not inconsistent with the requirements of the original state charter, as modified by the state Aid Act of 1864, excepting what had been done by congress."

Further dealing with the reserve power of a state to **control corporations of all kinds, whether actually incorporated within the state, or adopted under the laws of a state,** as a foreign corporation may do, (see section 1637 of the code) we cite

St. Louis I. M. & S. Ry. Co. vs. Paul, 173 U. S. 404, 43 L. Ed., 747.

This case came directly from the supreme court of Arkansas, reviewing the judgment of that court, affirming the judgment of the Circuit court of Salina County in favor of Charles Paul, the plaintiff, against the railway company for the amount of wages due plaintiff as a laborer of said company, and a penalty of \$1.25 per day for failure to pay what was due him when he was discharged from his employment by the company, as provided by the laws of that state, which was approved March 25th, 1889.

The statute of Arkansas in question required railway companies to pay their employees when discharged, their unpaid wages then earned without deduction, or if that was not done, then such wages should continue at the same rate until paid, not to exceed 60 days. The judgment of the lower court was affirmed by the supreme court of the United States, and it was held that the law in question did not deny the company the equal protection of the laws, and, further that it did not deprive the railway company of its property without due process of law. We quote from page 405, Fuller, C. J. delivering the opinion of the court:

"In *Leep vs. St. Louis I. M. & S. Ry. Co.*, 58 Ark. (23 L. R. A. 264) section one of the Act of March 25, 1889, was considered by the supreme court of Arkansas; and was held unconstitutional so far as effecting natural persons, but sustained in respect of **corporations** as a valid exercise of the right reserved by the constitution to alter, revoke, or annul any incorporation. * * * * * the Constitution expressly provided that the power to amend might be exercised whenever in the opinion of the legislature the charter might, 'be injurious to the citizens,' and as railroad corporations were organized for public purpose, their roads were public highways; and they were common carriers, it was held that whenever their charters become obstacles to such legislative regulations as would make their roads subserve the public interest to the fullest extent practicable, they would be in that respect injurious, and might be amended; and as it was the duty of the companies to serve the public as common carriers in the most efficient manner practicable, the legislature might so change their charters as to secure that result. And the court said: 'If the legislature, in its wisdom, seeing that their employees are and will be persons dependent upon their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end of their employment. If it would be true that in doing so it would **interfere with contracts** which are purely and exclusively private, and thereby limit their right to contract with individuals, it would **nevertheless under** such circumstances, have the right to do so under the **reserved power to amend.**'"

The court says further: "Inasmuch as the **right to contract is not absolute**, but may be subjected to the restraints demanded by the safety and welfare of the state, we do not think that conclusion, in its application to the power to amend, can be disputed on the ground of infraction of the 14 Amendment. *Orient Insurance Company vs. Daggs* 172 U. S. 557; *Holden vs. Hardy* 169 U. S. 552, *St. Louis & S.*

F. Ry. vs. Mathews, 165, U. S. I."

The Supreme Court thereupon in this important decision proceeds to discuss the case of Gulf, Colorado & Santa Fee Ry. Co. vs. Ellis, 165 U. S. 150, where a statute imposing an attorney's fee on the railroad for failure to pay certain debts was held unconstitutional, as an unequal application of the laws, i. e. that it penalized the railway company and no other debtors, and distinguishing, the court, at page 407, says: "In this case the act was passed for the protection of servants and employees of railroads, and was upheld as an amendment to the railroad charters, such exercise of the power reserved, being justified on public considerations, and a duty was especially imposed, for failure to discharge which, a penalty was inflicted. The penalty was sustained because the requirement was valid."

In the same line a very important, and it seems to us conclusive, holding as sustaining our position that the Temple Amendment is within the reserve power of a state to enact, is the case of

Knoxville Iron Company vs. Harberson, 183 U. S. 13; 46 Ed. 55.

The question there was as to the constitutionality of a statute of Tennessee, which statute provided that all persons who issue "store orders, script etc." to employees in payment of wages shall redeem them in money on any regular pay day, or any time within 30 days after their issuance, if presented and payment in money is demanded by such employee or by bona fide holders. The Supreme Court of the United States sustained this statute.

Avent Batesville Coal Co., vs. Com. Ky., 28, L. R. A. 273.

This reserve power of the states over the corporations which it has created or adopted, that is permitted to do business in the state under its laws, is very extensive, and may be exercised to an almost unlimited extent in the curtailment of the right of a corporation to exercise the power granted to it in its charter, or under the general laws under which it is incorporated. See

Orient Ins. Co., vs. Daggs, 172 U. S., 557.

A. T. & S. F. Ry. Co., vs. Mathews, 174 U. S. 96.

The court will remember that section 1619 leaves it to the

resident of Tennessee and in construing the constitutionality of a Tennessee act of March, 1899, requiring the redemption in money of store orders and scrip issued to employees in payment of wages; the Supreme Court, again held; Justice Shiras delivering the opinion of the court, that the fact that the plaintiff in error was a foreign corporation would not be important in determining as to the applicability of the Tennessee law, nor as to its constitutionality. The court in the opinion re-affirmed its former holding that such a law was constitutional as announced in *Knoxville Iron Company vs. Harbison*, supra, and thereupon disposed of the only remaining contention of plaintiff in error, to-wit, **that it was a foreign corporation**, and hence, not subject to the exercise of a **reserve power** of the state. The court says: "The only difference in that case (referring to the Harbison case) is that in the former the plaintiff in error was a domestic corporation of the state of Tennessee, while in the present, plaintiff in error is a foreign corporation. If that fact can be considered as a ground for a different conclusion, it would not help the present plaintiff in error, whose right, as a foreign corporation to carry on business in the state of Tennessee, might be deemed subject to the condition of obeying the regulations prescribed in the legislation of the state." Thereupon the court adopted the holding in

Orient Insurance Co., vs. Daggs, 172 U. S. 567, the concluding clause of which is "the power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations."

Adverse counsel contends to the contrary, and cites *Heep-er vs. Cal.* 155 U. S. 657; 39 L. Ed. 300, but the case does not support assertions of counsel. Mr. Justice White says in the opinion: "The power to exclude, embraces the power to regulate, to enact and enforce all legislation, in regard to things done in the territory of the state, etc."

But we will be excused from arguing this point further as it is so manifestly untenable.

II

The Temple Amendment under consideration was properly enacted in the exercise of the police power residing in the state of Iowa at the time it was exercised.

What are the exact limits of this police power, have never been precisely defined by any court as yet, and, necessarily cannot be, in view of the variety and diversity of trades and occupations constantly growing up and coming into existence from time to time, which may, in their turn call for new exercise of this police power. The gradual process of inclusion and exclusion is spoken of by many of the Judges; what might be today a proper exercise of the police power and rightful legislation on behalf of the public, in five years from now might be a gross transgression on private rights; and the converse proposition is true.

Many eminent jurists are of the opinion that Justice Tanny, in the "License Cases," 5 How. 583, Book 12, 291, has given the most perspicuous and comprehensive definition of the police power in a few words. Referring to this power he says: "They are nothing more or less than the power of government inherent in every sovereignty; that is, the power to govern men and things.

As said in

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Munn vs. people of Illinois, 94, U. S. 113, L. Ed. 24, page 84:

"Under this power the government regulates the conduct of its citizens one towards another, in the manner in which each shall use his own property, when such legislation becomes necessary for the public good * * * * * From this it is apparent that down to the time of the adoption of the Fourteenth Amendment it was not supposed that the statute regulating the use, or even the price of use, of private property necessarily deprived another of property, without due process of law; under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the state from doing that which will operate as such deprivation * * * * * Property does not become clothed with public interests and used in a manner as to make it of public consequence as affecting the public at large. When one, therefore, devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may with-

draw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control."

There is, in reality, no constitutional question involved in this case, necessarily. The legislature, in the exercise of its sovereign power, has investigated this question, which is the subject of the enactment, which, by general consent, is referred to as the Temple Amendment. The legislature is composed presumably of one hundred and fifty intelligent men, one hundred in the House and fifty in the Senate, who compose the legislative branch of the Iowa state government. They are especially charged with the duty to study the social, business and moral conditions of the state, and with rare and exceptional opportunities given them so to do, they come together every two years and give voice to their convictions as to what the general health and welfare demands, by the enactments which they make. As to what is and what is not for the public good is a matter for legislative determination, unless it becomes apparent in a given case, beyond reasonable doubt, that any given law passed by the legislature is not for the public good, but, on the contrary, is a bare-faced spoliation, and, hence, unconstitutional as not applying the laws of the state in an equal manner. These one hundred and fifty men composing the state legislature, investigated what they considered the evil that was growing up, that is, the disposition on the part of the great railroad corporations to circumvent the law of the state, which prohibited railroads from contracting in advance against their liability for injuries to servants injured in the actual operation of the road, i. e., the alleged Relief System organized by railroad corporations in several of the states,—and Iowa no exception—in which some railroads required their employees to contract in advance, that if they accepted the benefits which they had already paid for, out of their hard earnings, that such acceptance would preclude their rights to recover damages, which would otherwise be due them on account of the negligence of the Company.

Counsel, blandly, inquires wherein this enactment would promote, in any respect, the public welfare. He says it is unconstitutional as depriving the company of its property without due process of law, that it is class legislation, that it does

not apply equally to all classes, that it abridges the liberty of the company to contract, and therefore, in violation of the Federal Constitution; but counsel seems to forget that, in any event, **the burden is not upon the plaintiff** who invokes the law, to show that it will serve some public interest, but upon the company to show and make clear, beyond a reasonable doubt, that it will **not promote the public welfare in any respect**. The legislature has determined it, has investigated it. The presumption is, that they did it in good faith and with proper motives. The presumption is, that they discovered evils or a detriment to the public welfare in this scheme of the railroads to escape their liabilities for negligence to their servants, by making their servants contract in advance, as they must do, if they become members of this Relief Department.

The legislative determination is final, unless under the circumstances we have heretofore herein indicated; final, because it is primarily within the province of the state to legislate on these very matters. We take it that we would not be far wrong in asserting that there are fifty thousand railroad employees in the operating class in the State of Iowa who are dependent for their daily bread and sustenance upon these corporations, who **operate** these great public enterprises, an employment hazardous in the extreme, and which is, therefore, primarily within the protecting power of the state, in the exercise of this police power, as you have held several times, and therefore, it is very apparent that the counsel for the company have a very erroneous conception as to their rights to set aside this legislative enactment by an appeal to the Federal Constitution, and, especially the much abused and over-worked Fourteenth Amendment, which was enacted primarily, for the benefits of the African race, as has been announced frequently, by the decisions of the United States Supreme Court.

It has been judicially determined that the Fifth Amendment to the Federal Constitution, which like-wise contains the clause that no person "shall be deprived of life, liberty of property without due process of law;" that that clause was especially enacted and "inserted in the constitution, not to restrain the states, **but the Government.**"

Barron vs. Baltimore, 32 U. S. 293.

And also, judicially determined in what is known as the "Slaughter House Cases."

83 U. S. 36; Ed. 21, page 407.

Justice Miller delivering the opinion states: "The primary object of the Fourteenth Amendment was to confer citizenship on and protect the Negro race."

Corporation lawyers sometimes forget, or seem to forget, in their excessive zeal to prolong litigation and to obtain the ear of some higher tribunal, that the powers of the United States government are limited, when compared to the powers of the state governments, i. e., that the United States government has no power at all, save as they are granted to it by the people of the United States; and, on the other hand, the powers of the states are limited, save only, as they are restricted by the prohibitive clauses of the Federal Constitution, which a proper number of the states have, themselves, agreed to. As illustrating these prevailing, corporate misapprehensions of the purpose and scope of the Fourteenth Amendment to the Federal Constitution, we call attention to the opinion of Justice Miller in Davidson vs. New Orleans, 96, U. S. 96, where he calls attention to the fact that, substantially, the same language, that is, as relating to "life, liberty or property without due process of law," is contained in the Fifth Amendment, as in the Fourteenth Amendment, adopted nearly a century later. He then calls attention to the fact that this Fifth Amendment making sacred life, liberty and property, was rarely invoked during the century, calling attention to the fact that for some reason or other since the Fourteenth Amendment had become a law of the land, that the "Supreme Court docket is crowded" on account of alleged deprivations of property without due process of law, or an alleged infringement of liberty of some kind or other.

Justice Miller, in the opinion says further at page 100:

"It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the Federal Government for nearly a century, and while during all that time, the manner in which the powers of that government have been exercised has been watched jealously, and subjected to the most rigid criticism in all its branch-

es, this special limitation upon its powers has rarely been invoked in the judicial forum, of the more enlarged theater of public discussion. But while it, the Fourteenth Amendment has been a part of the Constitution, as a restraint upon the power of the States, only a few years, the docket of this court has been crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of the many cases before us, and the arguments made in them that the clause under consideration is looked upon as a means of bringing to the test of this court the abstract opinion of every unsuccessful litigant in the State Court, of the justice of the decision against him, and of the merits of the legislation upon which such a decision is founded."

It is seen, that the counsel for the respective parties in this case do not disagree on some of the salient points in the case. Counsel for the company admit that there is such a thing as a police power in a state, and, **occasionally** it may be exercised, but they take the position that if **it is** exercised, that it is unconstitutional for one reason or another, unless the appellate court can "**clearly see**" that the enactment is for the public welfare, safety, morals and the like. Now, that is just where we disagree with counsel for the company. It is true that counsel seem to have obtained several chance quotations from isolated federal judges, and some state courts, where the expression "clearly see" is used, and, yet, it is evident that that great historic tribunal, the court of final resort of the United States, never charged with partiality or deviation from the straight lines of justice, has held, almost uniformly that the determination of this question (public good) is, ordinarily, for the legislative branch of the government who has this public power, and the enactments will not be held unconstitutional, as being obnoxious to any clause of the Constitution, unless it is made apparent, beyond reasonable doubt, by the person claiming that it does infringe on some provision of the Constitution, i. e., that the passing of the enactments is

within the legislative discretion, and discretion, as we understand the meaning of the word, means that they may, or may not, as they see fit pass an enactment; that they may even arbitrarily pass an enactment which is unjust, and yet, being within their police power, that the unsuccessful litigant in a given case cannot make a Constitutional question of it, by simply declaring that he can see no good, valid reason for the passing of the enactment. The decisions present an unbroken array confirming us in this statement.

We do not want to be misunderstood. Of course, we claim that there are a great many valid reasons why this law should have been enacted, which become apparent on a mere suggestion, but what we do say is, that even though they are not apparent, but what we do say is, that even though they are not apparent, and, yet, the legislature, in the power vested in it, is presumed to have investigated this matter, and their discretion will not be interfered with, unless the company have made it apparent, beyond any chance for cavil, that their action was entirely arbitrary and not supported by any good valid reason. In other words, ordinarily the determination as to whether or not the exercise of power of the legislature is rightful or not is a legislative question, and not a judicial question. We cite

B. C. R. & N. Ry. Co. vs. Day, 82 Ia. 344.

In this case the law of the Iowa legislature was claimed to have been unconstitutional, because taking property without due process of law, the statute attacked, providing that all railroad companies within the state, shall, upon demand of any person interested, establish joint through rates for the transportation of freight between points on their respective lines within this state, and making it the duty of the Board of Railroad Commissioners, in the event of a railroad's failure, to so act, and establish such joint rates for the shipment of freight and cars and providing that the rates thus fixed shall be taken in all courts of the state as prima facie evidence that they are reasonable and just, and that any greater charge by any railroad company shall be deemed extortion. The act, also, provides for an attorney's fee in addition to the damages therein provided for. It was said that this act was unconstitutional as abridging the privileges and

immunities of railroad companies by compelling them to enter into an involuntary contract. We quote from the opinion of Justice Beck at page 342.

"Another familiar rule of law requires courts to uphold statutes, unless they are so **plainly and palpably** in conflict with the constitution as **to leave no doubt or hesitation in the judicial mind** of their invalidity. *Stewart vs. Supervisors*, 30 Ia. 9; *Railroad Company vs. Supervisors*, 59 Ia. 510. *Morrison vs. Springer*, 15 Ia. 304. It cannot be fairly claimed that the statutes in question are plainly **and without doubt** unconstitutional."

And, again, at page 344:

"Much is said in argument attacking the justice and policy of the statute. With these things we have nothing to do. They are for the consideration of the legislative department of the government alone."

We quote further from *Ex. Parte Davis*, decided in the Circuit Court of the United States, D. Ky. August 8th, 1884, 21 Fed. 396. Barr J., at page 396 says:

"The question of whether Congress or the Legislature of the state, has violated its provisions is always one of difficulty, and one in which the courts will solve doubts in favor of the constitutionality of the legislative enactments."

Further, see

Shelley vs. St. Charles County, 17 Fed. 210.

Where a statute of the state of Missouri was the subject of attack, and was held to be constitutional in this decision just cited. We quote from page 911 Circuit Court, E. D. Mo.

"It is proper to add that if the question were doubtful, this court would feel constrained, especially when dealing with it in advance of any consideration of the subject by the Supreme Court of the United States, to resolve all doubts in favor of the validity of the act in question. *Gilchrist vs. Little Rock*, 1st, Dill, 261."

We quote, further, from

Farmers Loan & Trust Co., vs. Stone, 20 Fed. 273.

From the Circuit Court of the Southern Division of the State of Mississippi, Hill, Justice:

"It is not necessary to refer to the adjudicated cases of the United States to maintain the well settled rule that courts

will not declare legislative enactments void by reason of their repugnancy to the constitution, State or Federal, except when the judicial mind is clearly convinced of such repugnancy *

* * * * * The court has no jurisdiction to determine the wisdom or unwisdom of the act in question; if unwise, the legislature, alone, can grant relief." And your words in *Howard vs. R. R.* in 207 U. S. 463, along the same line is still fresh in your minds. See brief.

In *Stone vs. Farmers' Loan & Trust Company*, supra, the law attacked as unconstitutional was a statute of the state of Mississippi regulating and limiting the charges of railroad companies for transportation. On appeal to the Supreme Court of the United States, in 116 U. S. 307, L. Ed. 29 page 642, the law was held unconstitutional, Chief Justice Waite using this language at page 313: **If there is reasonable doubt**, it must be resolved in favor of the existence of the power."

Again, see

Sarony vs. Burrows Gills—Lithographic Co. 17 Fed. 591, Cr. Ct. S. D. N. Y.

We quote from Coxe, Justice, at page 592:

"The court should hesitate long and be convinced beyond a reasonable doubt before pronouncing the invalidity of an act of Congress. **The argument should almost amount to the demonstration.** If doubt exists the act should be sustained. The presumption is in favor of its validity. This has been the rule—a rule applicable to all tribunals."

As holding the same see 20 Wall, 655.

Of course, the defendant and all other persons in the state are entitled to their liberty, including liberty of contract; but liberty, as stated in *Davidson vs. New Orleans*, supra, is not a license to do anything that the individual or company might desire, "but such liberty of conduct, choice and action as the law gives and protects."

The state cannot make its laws unequal in their application and protection; but it does not follow, from the statement of this truism, that any given law must be equal in its application to every person within the boundary of the state enacting the law, but it need be equal only in its application to every person in the class which the legislature has said shall be effected by the law. The legislature, if it is rational, has

the power and right to classify as it may see fit. This is a familiar proposition, that it is doubted whether the citation of many authorizes would be expected, however we cite several in brief in this connection.

In *McAnnich vs. M. & M. Ry. Co.*, 20 Ia. 343, supra, where the court held that the Iowa fellows-servant statute was legal, as applied to the employees engaged in the operation of a railroad, the court says:

"These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for, is similarly affected by the law. They are general and uniform in their operation on all persons in the like situation, and the fact of their being gneral and uniform is not affected by the number of persons within the scope of their operation."

The doctrine stated in this quotation is followed not only in the cases cited, but in all instances, so far as we have been able to ascertain, by the Supreme Court of the United States, where the matter has been before you. It is noticed that the language just quoted, applies to the first portion of the section of which this Temple Amendment was an amendment; and it is, likewise, noticed that the Temple Amendment to this section does not apply to all employees of a railroad company, that is, such as shop-men, station agents or the like, but applies precisely to the same class as does the main section, i. e., **to the employees who are engaged in the operation, such as running trains**, and hence, it must be said that the Temple Amendment applies to all persons equally, just as you said that section did before it was amended, i. e., to all persons within the class which were engaged in this hazardous occupation. Much is made in argument of *Gulf Co. & S. F. R. R. vs. Ellis* 165 U. S. 150, on the point of irrational classification. The case is not to be taken as an important holding as applied to instant case, for in the Texas there was no pretense of reasonable classification, simply the arbitrary requirement that the R. R. should pay plaintiff's attorney fees **when sued for certain debts**. Mr. Justice Brewer thus distinguishes: "It does not aim to protect the laborer or mechanic alone, for its benefits are conferred upon every indi-

vidual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals, supposed to need protection, but for the punishment of certain corporations."

In this connection we especially refer to *M. & St. Louis Ry. Co. vs. Herrick*, supra, where this same Iowa law, which imposed upon railway companies, for injuries to employees in its service, even though caused by the negligence or incompetence of fellow-servants, certain liabilities, came under judicial review by your court, and we suppose this decision is probably the most important on this question, as to classification, for the reason that it applies to this same section. And the classification in the Temple Amendment is precisely the same as was the classification in the section which the Supreme Court of the United States found to be equal in its application; or, in other words, not subject to the suggestion that it was class legislation. The case came up in Minnesota, but the Iowa law was relied on. The court in its opinion says:

"The defendant in its answer alleged, and on the trial contended, that this law was invalidated by the provisions of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The District Court held the law to be in full force. * * * * The plaintiff, accordingly, recovered a verdict of \$2000, upon which judgment was entered * * * * We have just decided the case of *Mississippi Pac. R. Co. vs. Mackey* (ante 107), where similar objections were raised to a law of Kansas, which on the point here involved is not essentially different from the law of Iowa, namely, for injuries to employees in its service, though caused by the negligence or incompetency of a fellow-servant; and we held that the law was not in conflict with the clauses referred to in the Fourteenth Amendment. On the authority of that case the judgment in the present one must be affirmed."

Now, quoting briefly from the Mackey case referred to in this Herrick case, at page 207 of the opinion the United States Supreme Court say:

"The contention of the company, as we understand it,

is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the Fourteenth Amendment. The plain answer to this contention is that the liability imposed by the law in 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its powers in this respect by their charters. Legislation to this effect is found in the statute books of every state. The hardship or injustice of the law of Kansas of 1874, **if there be any, must be relieved by legislative enactment.** The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with the clauses of the Fourteenth Amendment. The supposed hardship and injustice consists in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship or injustice, if there be any, exists when the Company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business, or in selecting its servants, if injury happens to the passengers from the negligence or incompetency of its servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured, be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That this passage was within the competency of the legislature we have no doubt."

.... "The objection that the law deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily

within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and the laws for irrigation and drainage of particular lands, for the construction of levies and the bridging of navigable rivers are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character.

* * * * * And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien upon buildings * * * * * a law requiring railroad companies to erect and maintain fences along their roads, separating them from the land of adjoining proprietors so as to keep the cattle off their tracks are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. **But the hazardous character of the business of operating a railway** would seem to call for special legislation with respect to railroad corporations, having **for its object the protection of their employees as well as the safety of the public**. The business of other corporations is not subject to similar dangers to their employees, and no objection, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are without discrimination made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufacturing factories. See

Missouri Pac. R. Co. vs. Humes., 115 U. S. 512.

Barbier vs. Connely 113, U. S. 27.

Soon Hing vs. Crowley, 113, U. S. 703."

We might as well stop here and point out where counsel for the company are wrong in their assertions relative to the alleged invalidity of the Temple Amendment, while the language of the Supreme Court in these Herrick and Mackey cases is yet fresh in your Honors' minds.

Counsel attacks the law as being class legislation; that it does not treat all classes or persons in the state alike; that, assuming that the legislature has the right to classify, that it is not a rational classification; that it is depriving them of their property without due process of law and the like. But we simply desire to call to our aid, the language of the authorities last quoted from, which state that the men who risk their lives daily in running trains are a class in themselves, and that it is a proper classification to grant to these train-service men a protection which is not granted to others, such as station agents, shop men, etc. This is a sufficient answer to all this talk that counsel indulge in, in the way of inquiring why it should not just as well apply to "factory employees," or to employees in the "machine shops" etc. The language of the Supreme Court just quoted from is a sufficient reply to these inquiries, no doubt well intended, of counsel for the company. Counsel in substance ask: "Why exclude the station agents from the benefits of this amendment, why not include them in the class?" The same question was asked when the original fellow servant section was before you, and you answered, in substance "that that vast army of R. R. employees who daily take their lives in their hands while running the train, are, on account of the great hazard, **entitled to special consideration** and protection, are entitled to be in a class by themselves; to extend the class would render the act unconstitutional and invalid." Let this be taken as appropriate response to the inquiry of the learned adverse counsel. How idle, anyway, to suggest the propriety of classifying the fat, slick office man, dozing luxuriously at his desk, with the real heroes of the road, who brave the icy winds of winter, and death, as they traverse the oft slippery tops; be it sunshine or storm, rain or sleet, there must be no stop for more favorable conditions, **the train must go on schedule time.**

This man has agreed in advance, that if he is carried home, maimed and mangled, and without a word being spoken (except that one cent perhaps of the indemnity is paid for which he has contributed dues, possibly, to the amount of hundreds of dollars) that such acceptance is an "election," and recovery against the company, is barred. Such is the much vaunted "Burlington Relief."

It occurs to the writer that these stray compliments, which a Judge here and there, saw fit to pass on this scheme, which are evidently so highly prized by adverse counsel, and carefully complied for this court's pursual, were evidently misplaced, induced largely, perhaps by the glowing encomiums of company attorneys and not the result of a careful study of the regulations, and their results, but in none of the cases were the statutes like this amendment. As pointed out in another connection the Shaver case, 71 Fed. 931, and the "Coast Line" case are the only cases cited closely in point, but they are not in point, as the statutes there, including all the R. R. employees. This long line of cases eulogizing the "Relief System" may be referred to for convenience, as "complimentary illusion cases" but a compliment is not the statement of a legal principle, and quite immaterial what these judges think of the scheme in the abstract, **with no statute** to control its action. Suffice it to say, that when the Temple Amendment was enacted, the Iowa Supreme Court made very clear their views in 131 Ia. 340, in the instant case, and the recalling of past compliments, is not provitable and serves no good purpose here.

Counsel in argument admit that section 2071, as it now stands, and without the Temple Amendment added thereto, only applies to persons actually engaged in and around train service. That being conceded, notice the language of the Temple Amendment precisely applying said Amendment to the class named in the section, and no others. Notice its language: "Nor shall any contract of insurance etc. * * *

* * * entered into prior to the injury between the persons so injured." The words, "persons so injured" can have reference to nothing else except to the section of which this Amendment is a part which states that the particular class of employees therein named may recover their dam-

ages when injured by the negligence of co-employees etc. It occurs to us that the question urged by counsel as to "class legislation" or "unequal protection" are disposed of, because the classification is a proper classification, and the highest court in the land has so stated.

Does it deprive them of their liberty of contract.

We have seen that liberty is only the right of enjoying such rights as the state gives to the subject the right of enjoying; some rights are curtailed; other rights are given, and the subject has the right of enjoying to the fullest extent such rights as are granted him by the law. Ordinarily the individual has a right of contract; sometimes the right of contract is denied, and rightfully so, as held by the courts. In the fellow-servant's act just under consideration, the right of a railroad company to contract is curtailed, and all courts which have had the matter before them, have held that that section was a proper exercise of the power of a state to deny, —that the railroad company had no right to contract in advance against its own negligence. And so, in many other circumstances and situations, the right to contract has been infringed, and such infringement has been upheld by the courts, in view of that fact that it is not an unalterable and universal right i. e., the right of contract.

Counsel for company in argument admit that under certain circumstances the right of contract may be abridged and curtailed, but they say under such circumstances "some good reason" should be produced for the exercise of such power curtailing and limiting the right of contract. We have already taken occasion to point out that counsel are in error in this position, for it is for them to point out, and beyond a reasonable doubt, wherein the constitution guaranteeing liberty, has been infringed upon by denying the right of contract, and unless it is so pointed out and beyond "a reasonable doubt" (as the authorities say) that the enactment which is under review will be upheld. And further, the authorities heretofore cited, and which will hereafter be cited for this Court's consideration, put emphasis upon the fact and consideration that, even though no good reason appears upon the face of any given enactment, that all due weight shall be given to the presumption that the legislature have acted, in

good faith and have properly investigated before acting, and that they have found some good reason, sufficient from their view-point, to authorize them to exercise the police power which is vested in them, as they deem best for the public good.

But while we feel safe in relying on this proposition of law just cited, yet, we might take occasion to say that there are many good, ample, sufficient and valid reasons which might be suggested as to why the legislature thought that the passage of this Temple Amendment in question would be for the public good, i. e. this portion of the public which the Supreme Court of the United States, as we have seen in the Mackey and Herriek cases, have held are a sufficient part of the public to justify the legislature in putting them in a class by themselves. It is true that we find chance expressions in some decisions referred to by adverse counsel, by Federal and State Courts, referring to the Relief Department, as it appeared at the time they passed on the question in the cases, several years ago, i. e., so much of that scheme as came to the eyes of the court, and it is doubtful whether all the regulations were sent up to the court, at that time; but these expressions are not binding, because, probably, all the regulations were not before the court, and for the further reason that there was only one question before the court for determination, save possibly two, the Shower case, 71 Fed. p. 931, and the Coast Line case, 80 S. C. 167, and in them the statute was different, the classification embracing all of the R. R. employees, and not **confining the classification to those engaged in operating as here**. And for the further reason that the rules of the Relief Department change yearly, and what might be a rule today would be abrogated a year from now, as suggested, railroad companies seem to have impressed their views upon some state courts, and occasionally, Federal Judge, and have succeeded in extracting from these courts some chance remarks of commendation, to say the least, admiration for these remarkable and ingenious contrivances devised by railroad companies for the purpose of defeating state legislation, prohibiting railroad companies from contracting against their own negligence.

But this court will bear in mind that while these courts

refuse to hold as a matter of law, that the sample of the relief regulations which came under judicial review, were, in themselves and on their face, so iniquitous and oblique in their moral features, as that they would pronounce them void as against public policy, they never did, nor has any other state tribunal ever held, that if the legislature, after an investigation, should deem it within both their reserve and police powers or either to pass an enactment, of which the Temple Amendment is a sample, that such an enactment was, or would be unconstitutional, if the classification be restricted as here.

Counsel for defendant only present for the consideration of this court, two cases which can be said to have any close bearing on the matters here involved and under discussion, and accordingly numerouslly cite, at oft occuring intervals in argument the case of

Shaver vs. Pennsylvania Co., 71 Fed. Cr. Ct. N. D. Ohio, W. D. 931. And Sturgis vs. Atlantic Coast Line 80 S. C. 167

Judge Rick, District Judge, here held that the Ohio law, which provided that no railroad company, insurance company or association or other person shall require any agreement or stipulation with any other person in or about to enter the employment of a railroad company, whereby such person agrees to waive any right to damages from such railroad company for personal injuries or any other right whatever, and all such agreements and stipulations shall be void."

It is readily noticed that the Ohio law is very different from the Temple Amendment in a very important respect. The Temple Amendment confines its provisions to employees who are engaged in the hazardous occupation of operating and working upon and about trains; whereas, the Ohio law was so broad that it even covered station agents.

The distinction between the two statutes render this much mooted Shaver vs. Pa. Co. valueless, as affording any particular help to this court in a in a solution of this problem.

There is, however, one portion of the argument of the District Judge who rendered the Shaver decision which the Supreme Court has indicated, by a recent decision, to be without weight, to say the least, Judge Ricks speaks as follows, relating to the inestemable boon of personal liberty, at page 937

"The act under consideration is certainly one which im-

pairs the rights of **a large number of the citizens** of Ohio to exercise the privilege which is **dear to all persons**, namely, that of making contracts concerning **their own labor and the fruits thereof**, and so far as it relates to such contracts already made, impairs their validity."

As an indication as to how the Supreme Court of the United States would dispose of the Shaver case, if it ever succeeded in getting there, is indicated by the following language in

Holden vs. Hardy, 169 U. S. 394, 42 L. Ed. 793;

In which case the statute attacked as unconstitutional was a statute of Utah, providing that it would be unlawful for mine owners to contract with their employees to be under ground over 8 hours in any one day, and making a violation on the part of either employer or employee a misdemeanor. This transparent argument about the poor "employees being deprived of their precious privilege of contract" was exploited it seems, in the Hardy case, which is a very late case, being before the Supreme Court of the United States in 1897, and the Supreme Court have this to say about it near the end of the decision, the court saying:

"It may be proper to suggest in this connection that although the prosecution of this case is against the employer of labor, who apparently, under the statute, is the only one liable, his defense is not so much that his right to contract has been infringed upon, but the act works a peculiar hardship to his employees whose right to labor as long as they please is alleged to be thereby violated. **The argument would certainly come with better grace and greater cogency from the latter class.**"

And so the language of the Supreme Court might be adopted in reply to the laments of counsel for this company over this wicked deprivation of a great army of their employed from making this contract with the company to accept **something that they are already entitled to**, and while so doing to give away more than they are also entitled to, in consideration of the fact that they have received something that they were entitled to. When the remark or suggestion is made by counsel that the employees are very much in love with the workings of this Relief System, it simply demons-

trates that the distinguished counsel are humorists of no ordinary variety.

As a striking commentary upon the alleged euitableness of the Relief System of the defendant company, we refer the court to

Miller vs. C. B. & Q. Ry. Co., 65 Fed 305.

Wherein the court holds that these regulations are contrary to public policy, and are no bar to the employees bringing suit, even after he has accepted the daily benefits. The decision is important, **because the complete regulations seem to have been all before the court**, and it is evident that the court spent much time in analyzing them with the view of formulating its decision. We quote a little from the opinion at page 306.

"In connection with this provision for the paying a deficiency in the funds, it should be remarked that the rates paid by the members are manifestly intended to cover the costs of the insurance, and a deficiency is a contingency not likely to happen. It does, in fact, happen sometimes, but the amounts thus paid by the companies are inconsiderable. In case of disability or loss of time from accident or sickness, employees who are members of the relief department receive certain sums weekly or monthly, according to the class in which they belong. There is also insurance upon the life of the employee in consideration of other and additional payments, which need not be mentioned in this connection. In the contract of insurance, and set out in the application for membership, there is a provision as follows: (then follows the regulation which provides that acceptance of benefits is a bar to recovery of damages) * * * * * Upon demurrer to this answer we are to consider the nature and effect of this provision of the contract, and whether the acceptance of benefits by the plaintiff under this contract of insurance should bar this action for injuries received through the negligence of the defendant. It is clear that what the plaintiff received from the relief department was only that for which he had paid from time to time from his monthly earnings. **As already stated, the consideration mentioned being the amounts paid and to be paid by the company for the maintenance of the relief department, is only a pretense.** From motives of

humanity, employers are compelled to have some care for the sick and injured in their service. In recent times various schemes have been adopted for getting the cost of this care and attendance from the person employed. Some employers compel their men to contribute to a hospital fund, from which the sick and injured in their service may be maintained; others insure the life and health of their servants in one or more of the many accidents or casualty companies who make it their business to care for those who may be engaged in this hazardous service. Whatever method may be adopted, it is plain that anyone who employs a large number of men must be at some cost of time and money in respect to the care of their bodies, if not of their souls, to keep them in health, and cure their hurts. If the men can be induced to pay the cost of this either to the employer or the insurance company, the employer is so far relieved from a heavy burden, which in most instances he ought not to bear. In ordinary sickness and in most cases of injury the men ought to pay the cost of their keep, of nursing, of medical attendance, and the like because these things come without fault of the employer in the ordinary course of human infirmity. Therefore the employer ought not to be blamed for putting the burden of caring for the sick and the injured, in general on the shoulders of the men, where it properly belongs. In doing this, however, he should not seek to evade the responsibility imposed upon him by law for the consequence of his own negligence. The rule which requires the employer to respond in damages to his servants for his negligent acts is sound and wholesome. It ought not to be set aside on any pretense of waiver on the part of the party injured from doing some thing that he has a clear right to do. It is said that the employee is not bound to accept benefits from the relief fund, and, if he does accept them, with full knowledge, that he waives his right of action, he ought to be bound by his act. The logic of the proposition should be differently stated. Having paid for benefits, upon what principle can be required to renounce them? If, for illustration, plaintiff had taken a policy in some accident and casualty company, could he be required to give up his right of action against the railroad company on accepting benefits from the insurance company? I think not. And the fact that

the railroad company has entered into the insurance business does not effect the question in any way whatever. In respect to this contract defendant is an Insurance Company, and, having received the premium demanded of plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the company as an employee. **Having paid for them**, plaintiff is as much entitled to the benefits received by him under the contract of insurance as to his monthly wages for services rendered to the railroad company. It was long ago wisely held that an employer cannot relieve himself from responsibility for his negligent acts by **any provision in the contract of employment**, and so it has come to pass that the company could not make the receipt of wages a waiver of this sort of action. No more can it be said that payment and receipt of benefits under a contract of insurance, such as is alleged in the answer, should bar the plaintiff's action. * * * * The reason of the thing stands altogether on the other side. The demurrer to the third answer will be sustained."

In *Minnesota Iron Co. vs. Kline*, 199 U. S. 593, 50 L. Ed. 322: A statute holding a railway company liable for all injuries and etc. by reason of negligence of any agent or servant thereof, and no contract, rule or regulation shall impair or diminish said liability, provided it shall not apply to new railroads not open to public travel, being a Minnesota statute. Held by the United States as valid and the court state: "There is no doubt that their freedom may be limited where there are visible reasons of public policy for the limitations.

The whole case is put on the proviso, and the argument with regard to that, is merely one of the many attempts to impart an over-mathematical nicety to the prohibitions of the 14th amendment."

In *Jacobson vs. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643, compelling vaccination, a law compelling vaccination was reversed; it says:

"The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, to be wholly freed from restraint. There are

manifold restraints to which every person is necessarily subject for the common good."

In *Gundling vs. Chicago*, 177 U. S. 183, 44 Ed. 725, you say: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities in the country, and what regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state."

In *McLean vs. Arkansas* 211 U. S. 539, Arkansas enacted a law that, 53 L. Ed. 315, miners must be paid by weight of coal before screening, you said:

"The right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business, conflicts with laws declaring the public policy of the state, enacted for the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract."

In *Gateway vs. North Carolina* 203 U. S. at 541, 51 L. Ed. at 309:

Where plaintiff in error was indicted for running a "bucket shop" under the state law we find the following statement—"In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong since, in effect, it reads out the provisions of section 7, and it is urged that it is the duty of this court to disregard the interpretation affixed by the state court, thereby bringing the statute within the prohibitions of the 14th amendment. **But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view.**

Packing Co. vs. Lacy, 200 U. S. 226, 50 L. Ed. 451; *Smiley vs. Kansas* 196 U. S. 447, 49 L. Ed. 546.

LOCAL OPINION—"MUCH RESPECT"

"Even if the provisions before us should seem to us not to have been justified by the circumstances locally existing in Calif., at the time when it was passed it is shown by its adoption to have expressed a deep seated conviction on the part

of the people concerned as to what that policy required. Such a deep seated conviction is entitled to great respect." If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessary abjectionable the courts cannot interfere, unless in looking at the substance of the matter they can see that it is clear, unmistakable infringement of rights secured by the fundamental law."

Otis vs. Parker 187 U. S. at 609; 47 L. Ed. 327, we call attention to Patterson vs. Endora 190 U. S. 169, 47 L. Ed. 1002.

Here all protection is thrown around the rights of sea men to contract with reference to their own wages prohibiting the assignment etc., but Mr. Justice Fuller in upholding, delivering the opinion of the court, says:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizens is that of the liberty of contract, **yet such liberty is not absolute and universal. It is within the undoubted power of the government to restrain some individuals from all contracts, as well as all individuals from some contracts.**

See also as holding the same Kenney vs Blake, 125 Fed. 671.

Atkins vs. Kansas 191 U. S. 207, is important as holding that neither a laborer or the city for which he was working had the absolute right to contract **for longer hours than as provided by the state statute.**

As heretofore stated although it might occur that this court could not readily think of any valid reasons that the legislature might have in mind, as a cause for enacting this Temple Amendment, **yet the presumption obtaining that the legislature did have valid reasons in mind**, this court would sustain the enactment as a proper exercise of their reserve power over corporations, and, also, under their general police power. But we do, thereby assuming a burden for the purpose of argument which is not ours, desire to point out some of the things which, unquestionably, the legislature did have in mind.

First.—The company and its employees are not on equal terms. They are not dealing at arms length. The company

with its tremendous leverage, holds in its hands the lives and liberties of many thousands who daily risk their lives in the employment of the train service. But it is said, it is a question of free agency on the part of the employee, the employee don't have to risk it. They admit that the 52 weeks of benefits are no adequate compensation for a half a foot taken off, provided it is not above the ankle; "but if the employee take it with his eyes open, then let him stand by it. No matter if the adjusting agent does, soon after the injury to the employee, when in excruciating pain, slip around his abode and almost force the benefits upon him; if he take it, let him abide the consequence, and stand by the contract." The foregoing is suppositions language of adverse counsel, and a correct substance of their assertions in arguments. They admit that it is not a profitable contract for the employee in the train service to make, where he meets with grave injury; but say, **he having agreed in advance** to be bound by his contract, that if the smooth and insinuating adjuster of the company succeeds in forcing his insignificant daily benefits upon him, that the employee should be bound by this contract, and be held to have so elected.

It is an unequal contract, the parties are not on equal terms, and it is within the police power of a state to step in and say to the railroad company, you shall not only obey the statute of the state before the Temple Amendment, but we will likewise see that you obey it now in its spirit; and even though you force your employees to become members of the Burlington Relief Department as a price for remaining in your service, yet be it understood that if any of these employees who are in the train service meet with injury the fact of their accepting these insignificants benefits, which they have paid for, shall not bar their right to obtain their just deserts in a court of justice. This question of unequal terms of the contracting parties has received judicial notice at the hands of the **tribunal of last resort of the United States**, where it has been held that this very fact of inequality of the parties and that they were not dealing at arms length, is a matter of which the legislature may well take notice when determining whether it will or will not exercise its police powers. We refer again to

Holden vs. Hardy, 169 U. S. 388; 42, L. Ed. 793, where the legislature of Utah, by its laws passed, said not only to the mine owners, but also to the laborers, that it should be an unlawful act for any laborer to work under the ground over 8 hours per day in the mines, notwithstanding any contract to the contrary. The court adopts with approval the following language from the Supreme Court of Utah, and in so adopting used the following words:

We concur in the following observations of the Supreme Court of Utah." We here quote from the language adopted at page 398.

But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to a contract shall be protected against himself, the state still retains an interest in his welfare."

Second.—It is not voluntary. The employee is forced to either become a member, or forced to leave the employment of the company. The companies do not force the station agents to become members unless they want to, but they compel all their employees in the more dangerous part of their employment to become members. This is a matter of common knowledge; and it is safe to say that there are not 10 men in the employment of the Chicago, Burlington & Quincy System of railroads who have been in the employment of the company for three months but who are members of this Burlington Relief Department.

The regulations say "voluntary" but the word is a travesty; it is not voluntary, and the senior counsel in argument in the Iowa Supreme Court practically admitted that the company will not retain in their service a man who did not become a member. In Judge Trimble's argument, before said court he paid his respects to the employees who object to this relief department. He said they are "thoughtless and improvident" and then proceeds to disclose the cloven hoof of this alleged "voluntary" organization:

All railroads and other industrial organizations whose business is, to any extent hazardous, try to avoid them.

One of the best features of the Relief Department——

the feature that is valuable to the public as well as the company, is, that it tends to weed out this class of men. When an employee declines to become a member * * * * * when the service is to be cut down, or employees, for any reason discharged, he is one of the men who goes first. You will notice that the opinion of the Iowa Supreme Court refers to this admission of Judge Trimble.

Now, if the counsel had not admitted in his argument, that this alleged "voluntary" organization was in fact not voluntary, the regulations themselves would so stamp it. Doubtless the legislature, after investigation, saw very plainly how easy it would make this Relief Department oppressive; how easy it would be for the railroad company, while not compelling its employees to go into this contract with the company at the point of a revolver, yet, by a mere suggestion that the continuance of their service with the company would depend on whether or not they joined the Relief Department, that the employee, acquiescing against his will, would become a member, in reality by force and oppressive measures.

As a mere illustration as to what the legislature found out in their investigation as to show the company might work this plan, that is, a mere illustration of our thought, we want to quote a sentence or two from the plaintiff, McGuire's reply, to which the trial court in this case sustains the demurrer. We quote it simply as one of the illustrations whereas the legislature probably had many, before they made up their minds that this Temple Amendment would be a salutary public measure. We quote as follows:

"That plaintiff made application to said Relief Department under compulsion practiced on him by his superior officer, to-wit, M. E. Burson, train master of the Chicago, Burlington & Quincy Railroad Company * * * * * That plaintiff was distinctly told by said M. E. Burson, that if he did not make application to said Relief Department, that he, said plaintiff, could not hope for promotion, and further, that he could not remain in the service as a brakeman longer than the first of the following year, and the plaintiff believing the words of said Burson * * * and so believing through fear, made application as stated in said answer of defendant."

Third.—The employee, in accepting the benefits, simply accepts what he pays for. The plan is so formed that the company pays not a farthing towards the maintainance of the relief fund, if it can be avoided. Of course, in getting the Relief Department upon its feet, there might be a deficit; but it is not claimed at the present time, when in full operation, there is a deficit. It is noticed by regulation 14 that the company, very wisely provided that, in determining whether there will be any deficits which the company will have to pay, that they shall have a stretch of "three years" to go on, and if there is a deficit at the end of the first or second or at the end of two years and nine months, that, yet, the company will not assume said deficits, unless there is an actual deficit at the end of three full years, but, even then, it seems by this regulation 14 that the company may recoupe themselves for deficits previously assumed (See Reg'n's) "by vote of 2-3 of the committee, and approval by the board of directors." Of course the company gives the department the use of their station agents, but that does not cost the company anything extra, but it is simply additional duties imposed upon the station agent, keeping records; and so far as being a deficit at the present time, the records disclose there is something like \$244,000 of a surplus, from which it follows that there is no sufficient consideration in any event, for the contract which the company relies upon in this case.

Fourth.—The whole department is in the charge and under the control of the company. The regulations, speciously, provide for the employees appointing part of the advisory "ommission, but it is seen that the company retains the control, having the majority of the committee. The company appoints one-half of the committee; the General Manager of the Chicago, Burlington & Quincy Railroad Company being ex-officio a member (see regulation 5.) The Superintendent of the Relief Department has charge of all business of the Department, and is final arbiter in all matters in dispute between the department and its members; but he, as well as his assistants, and the medical directors, are appointed by the President of the railroad company. (See regulation II.)

Fifth.—If a member meets with a grave injury, he has no right to establish the fact by competent doctors of his own

choosing, for the medical examiners (see regulation 12) shall "decide" when members are disabled, and when they are able to work. It gives much room for oppression. As an illustration of how a young medical examiner might oppress in a proper case under this regulation, we illustrate by the situation of Mr. McGuire, when his body was crushed between the bumpers of the car, and laid in bed for nearly 52 weeks, and Dr. J. L. Sawyers, of Centerville, Iowa, made an incision in the abdomen of Mr. McGuire of 5 3-4 inches long, thereby so weakening the muscles and tissue structures that the plaintiff has never been able to do a days work since without excruciating pain and can't now, being a total wreck. This medical examiner at Centerville adjudged, at the end of 40 odd weeks, that he was no longer disabled and was able to go to work—a laughable farce of a decision; but under this rule it was final and settled the matter. The legislature probably investigated similiar cases, and found that this seemingly inoffensive regulation furnished a tremendous engine for oppression of the worst kind against the injured employees of the company.

Sixth.—The employees of the company have no voice in saying what shall be added to their contract as contained in these regulations, because regulation 16 provides that a bare majority of the committee is sufficient to pass a new regulation, and, further provides when so passed it "shall be binding upon * * * the members of the relief fund, and all persons claiming through them." The legislature, probably, also considered this remarkable feature, which is common in the Relief Departments of the United States.

Seventh.—The legislature probably, considered the features of regulation 29, where it is provided that if a member is "relieved or discharged" from service, "his membership in the relief fund shall terminate with his employment, and he shall not be entitled to benefits for time thereafter." In other words, if he had paid in \$1000 for benefits, yet, if he was discharged after he had paid the last of the \$1000, possibly being too old for economical use by the company, then, if he were injured in any manner the day afterwards, he would not receive one farthing. That is "equitable." 2. And fair dealing also? And as a climax to the whole business, it

is provided, further on in the regulations, that he cannot even receive death benefits, unless he has been continuously in the service three years, and a member of the Relief Fund one year immediately preceeding the termination of his employment; and even then "only in respect to the minimum death benefits which he held at any time during the last year, or for any smaller amount, when making supplemental application etc., etc." This regulation disposes of much of the high sounding talk that the regulation provides for "death benefits, even though the employee leaves the service," and, that therefore, he does not lose his contributions altogether; but the regulations just quoted from, governs that feature, and the employee who has only been in the service 2 years and 9 months, if he is discharged from the service without fault on his part, receives not one cent for the dues he has paid in, if he is injured, or any amount whatever in case of death. The legislature, probably, had an eye on these remarkable regulations, or some similar regulations in other Relief Departments, when making this highly commendable Temple Amendment.

Eighth.—By regulation 30 no matter how much money an employee has paid in to the Relief Department, yet, if he absents himself from duty for a period of 6 days without the permission of his employing officer, he loses all of his contributions, and his membership is terminated.

Ninth.—Regulation 38 provides in substance no matter how much money an employee has paid into the relief fund, be it \$1 or \$1000, yet if when he is injured or dies he is in arrears to the amount of two cents, then no benefits shall be paid. Analogous laws of the state of Iowa and other states seem to recognize that such a provision is inequitable and not to be tolerated. The statute of Iowa provides that no contract for the sale of property shall be forfeited until 30 days notice is given, and if within the 30 days a compliance is made in the matters complained of, the contract shall be reinstated. The statute provides, further that contracts of insurance shall not become void for non-payment of premium until the company has given 30 days notice in writing of such delinquency, specifying the very date on and after which the policy will be null and void, for non-payment of premium. Yet, no such pro-

vision is made for the benefit of the unwary employee.

Ninth.—(a) Regulation 45 provides the “decision as to when members are disabled and when they are able to work shall rest with the medical officer of the department;” and it further provides the medical officer shall decide whether, when a member is sick, his sickness is the result of some former attack or injury, that is, in the language of the regulation, a “relapse,” or “an original disability.” The regulation says: “This shall rest with the medical officers of the department.” If these officers on examining a member, find that his sickness is a relapse of some former sickness this highly “equitable” regulation provides “when the disability is classed as a relapse the time of such disability shall be considered a part of the original disability in determining the length of time for which benefits may be drawn, and the rate at which benefits are payable.”

Tenth.—(a) Reg. 46 discloses the fact that it is not the intention to award any substantial sum for permanent injuries, and provides that members of the third class, to which class McGuire would belong, when he should attain to full membership, should only receive \$1.50 per day for 52 weeks, and 75c per day thereafter during the continuance of disability, and such surgical “treatment as may be approved by the medical director;” but regulation is careful to provide, that the decision, in any case when surgical treatment is necessary, and what kind of service shall be regarded as surgical treatment, shall rest with the medical officers of the company.”

This regulation further provides that, although a member is seriously disabled by a sprain, strain or wrench, that if there is no physical proof on the outside to indicate that there was a strain, that the member shall receive nothing in the way of benefits, unless he makes proofs which are “satisfactory to the Superintendent.”

Eleventh.—In the case of sickness regulation 47 provides that a member of the third class shall receive but \$1.50 per day for 52 weeks, and that thereafter he can receive nothing, even though he be sick for 52 weeks longer.

Twelfth.—Regulation 56 provides that no matter how much dues a member has paid in the years past, yet, that if he

is injured "while on a furlough" and "while away from his usual place of residence when on duty," that he shall receive no benefits whatever, unless the member "proves his disability while absent to the **satisfaction of the Superintendent**" which might be done if the superintendent was in an agreeable humor at the time. If the superintendent were in a good humor, he might allow the member's meritorious claim; if in a disagreeable frame of mind, he might reject it, and the employee, the contributing member, would have no remedy, according to this regulation, **because**—

Thirteenth.—Regulation 64 provides that "all questions or controversies of whatever character arising in any manner * * * whether as to any claim for benefits preferred by any member * * * of whether as to the construction of the language of the meaning of the regulation * * * shall be submitted to the determination of the superintendent, whose decision will be final and conclusive thereof, unless an appeal from such decision shall be taken to the committee within 30 days after such notice of such decision to the parties interested * * * and shall be determined by a **vote of a majority** * * * and the decision arrived at thereon by the committee shall be final and conclusive upon all parties **without exception or appeal.**" And it will be remembered that this same Superintendent has the casting vote in the committee, so the appeal from the Superintendent to the committee is a mere farce, because the superintendent makes the one majority for the company.

Fourteenth.—Regulation 57 provides that if a disabled member goes away on a visit and does not keep up a steady correspondence with the medical examiner, and "keep him informed of his address," and "report to him immediately upon his return," that he shall not be entitled to any benefits while he was away on a visit "unless he proves his disability while absent **to the satisfaction of the Superintendent.**" Probably the legislature looked into this regulation also when determining whether the word "**beneficent,**" used by the court in the Shaver case, was a fitting adjective to apply to this Relief Department.

Fifteenth.—We, especially call attention to the fact that there is no provisions in the regulations for any substantial

damages for permanent injuries.

It is to be inferred from counsel's argument, that it is entirely immaterial whether this department in fact, is "voluntary," in view of the fact that the answer **alleges** it is voluntary; in view of the fact that the demurrer, for the purpose of the case, confessed it was. That view is entirely too limited, and will not be entertained by the court, for the reason, as we have seen by the language of the United States Supreme Court, that the law will not be declared unconstitutional, unless it is shown, beyond reasonable doubt to the satisfaction of the court, that it is opposed to some constitutional provision. And, further, that if this court believes that the legislature, when investigating whether there would be any good reason to make the law or not, found that the working of this Relief System, in general, made membership compulsory, and that the word voluntary, as applied to them, would be a **Hyperbole**, that then, in such event, the court as a matter of course, will sustain the law, even through in this particular instance, the word voluntary was inserted in the answer, contrary to the fact. The decision that the court will render in this case will be of wide and far-reaching significance in many portions of the United States; it will be no technical decision, but it will be a decision on the broad question as to whether or not railroad companies can circumvent the law prohibiting prejudice it can be clearly perceived, that in 9 times out of 10, them to contract to exempt themselves from liability because of their negligence, to the employees engaged in the train service, by such Relief Departments, such as we have illustrated in the case at bar. That is the proposition.

We have pointed out at least some of the matters which were probably in the minds of the legislature when determining the question as to whether the enactment of the Temple Amendment was required for the public good, but it doubtless had many other reasons in mind; but I have mentioned some of them which cannot be said to be without weight.

It cannot, for one moment, be said but what the contracting parties are on equal terms; the company has every advantage, and to assert the contrary is but idle; and it is re-assuring to remember that in about the last utterance from the Supreme Court of the United States on this subject in the Hol-

den vs. Hardy case supra, that the Supreme Court have announced this very proposition, and have said that such a consideration is a sufficient justification for the legislature to exercise this reserved power of control, as well as the police power. In other words, and in addition as they say, **"to protect the employee against himself."**

Counsel in argument seem, apparently, unable to realize how such a situation can come about, to make good our claim that the parties are not on equal terms, and not dealing at arms length. It is hard to conceive, and to a mind free from the company, by the leverage of this Relief Department, could take advantage of its employees in this class when injured. **It may be assured** that the great majority of the members, as well as the great majority of the holders of policies of insurance never read the documents, which are the basis of their rights; and many of them being illiterate and cannot read them.

Another thing which the legislature considered, when determining whether there was any good, valid, public reason for the passing of this Temple Amendment, was as following: They became convinced, by the statistics and the annual reports of the railroad commissioners, both state and federal, that railroad companies were subordinating the safety of their passengers and employees to the consideration of a yearly dividend. They found, by statistics, that the number of employees killed and injured in the year previous to its enactment was appalling, to-wit: 3283 killed and over 46,000 injured, and the number of passengers killed and injured was a terrific slaughter. They found that in England in the year previous, that loss of life and injured, either passengers or employees, was but trifling and insignificant as compared with the appalling figures of the great railroad systems of the United States, which in the language of a railroad magnate reported in public print, "take care of the main line, but don't put too much expense on the feeders," discloses the true situation; but at the same time found that these great railroad corporations were constantly reaching out to get possession and ownership of "main lines" **to make** feeders out of them; found that the road beds of the main lines were kept up in pretty good shape, but that the road-beds of the feeders,

which the company had bought in, were permitted to go down and became a menace to life and limb to those who passed over them; found that in England that the "block system" was complete, whereas, in this country, according to even the last report of the railroad commissioners of the United States, that only a fraction of the entire railroad mileage of the companies, is worked with block signals. The same reports, also disclosing vast number of R. R. collisions of all kinds in the United States, in which many passengers and thousands of employees were killed, and many more thousands injured. The legislature considered these matters carefully, and came to the conclusion, which is a fact, that outside of the employee public that the general outside public were largely also interested in the passage of this law, **for the reason that any contract, employment or scheme, which can have the effect of in the least, lightening the burden of the company in making good, and paying the actual damages which they cause by reason of their greed to make money, in not providing proper facilities, and by their own negligence, would have the effect to lessen the care which the railroad companies would otherwise exercise to prevent these terrible accidents and injuries and deaths, the frequent occurrence of which have shocked the American public.** If the railroad companies fully understood, that if they are negligent, or not thoughtful to provide proper facilities to prevent accidents, such as good tracks or the block system, double track or the like, or any proper and appropriate facilities to prevent accidents,—we repeat, if they understood that when an engineer, fireman or brakeman is killed by their negligence that they will have to pay a substantial sum in damages, it goes without saying that they will be more thoughtful to provide proper facilities to prevent these accidents and consequent injuries; that they will use a little less money in purchasing "feeders," and bestow more money in making the line substantial and safe that they actually operate, and if they will do this, there will be a proportionate decrease of accidents whereby the public in general are injured, as well as the employee public class, and, as a result, it goes without saying, that both the said publics are benefited.

**LIBERTY OF CONTRACT, AND WHO IS TO DETER-
MINE WHEN ITS ABRIDGMENT IS REQUIRED
FOR PUBLIC GOOD**

It seems to be conceded by adverse counsel in this case that liberty of contract is not a universal right, but may, in a proper instance, be abridged. It is said by counsel for the company that the courts shall consider this as a judicial question, and determine in a given case when it was properly abridged by the legislature. We claim that primarily and almost universally, it is a matter for the legislature to judge whether the abridgment of the right of contract is necessary for the public good.

This court has upheld laws in defiance of contracts in so many analagous instances, which would seem to so much more nearly approach the boundary line separating rightful legislation from arbitrary enactment, that we can entertain but little doubt as to how the court will view the Temple Amendment, which is, likewise, a law, so to speak, made in defiance of contracts to the contrary.

Section 2055 of the Code of Iowa provides that railroad corporations shall pay double the value of any stock killed, in some cases unless they settle with the owner thereof within 30 days after notice served.

This law was vigorously attacked by the railroad companies as being opposed to the constitution of the State, and also the United States, as depriving the company of its property without due process of law, and, likewise, denying it the equal protection of the laws, but the law was upheld in

Jones vs. C. N. Ry. Co. 16 Ia. 6.

Welch vs. C. B. & Q. R. R. Co., 53 Ia. 632.

Minneapolis & St. Louis R. vs. Beckwith, 129 U. S. 26.

Section 2074 of the Code of Iowa prohibits any railroad corporation from entering into any contract to exempt the railroad company from liability for damages sustained either by passengers or shippers, "which would exist had no contract, receipt, rule or regulation been made or entered into." This was savagely attacked by the railroad companies as being unconstitutional in every respect, but was sustained, uni-

formly by the courts. See

Brush vs. Ry. 43 Ia. 554.

Davis vs. Ry. 83 Ia. 744.

Lucas vs. Ry. 112 Ia. 594.

In Brush vs. Railway, supra, it was held that it was immaterial whether there was or was not any consideration for the contract seeking to exempt the company from liability.

In Davis vs. Railway, supra, the company and a passenger entered into a contract limiting liability on a trunk to \$100, and the contract was held to be void, and the section upheld.

In Lucas vs. Railroad, supra, the contract limited the liability on the horse shipped to \$100. The horse was a valuable pedigreed animal, and shipment was obtained by the shipper, and, yet, Sherwin J., delivering the opinion of the court, held that such consideration did not effect the liability of the company to pay for the true value of the horse.

See, also,

McCune vs. Ry., 52 Ia. 602.

Relating to this same section here under consideration.

In Rose vs. Des Moines Valley R. Co., 39 Ia. 246.

This same section relating to passengers was upheld, notwithstanding the fact that the plaintiff was riding upon a "pass," on which was a stipulation signed by himself, that in consideration of the free transportation he agreed to exempt them from liability in case he was injured. Your honorable court held that the agreement with the company was void, and the statute was upheld and a judgment for \$5,000 was authorized.

In Solon vs. Ry., 95 Ia. 260.

This section 2074 was upheld, even though the shipment was between different states. The state Supreme Court was upheld by the United States Supreme Court (see 169 U. S. 133.) Justice Gray delivering the opinion of the court says:

"The question of the right of a railroad corporation to contract from exemption from liability is * * * * * one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute relating to the subject, will exercise its own judgment, uncontrolled by the decision of the courts

of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restricted by the Constitution of the state, or by the Constitution or laws of the United States * * * * *

Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of the state, are subject to its law. It is the law of the state and provisions are to be found concerning the rights and duties of common carriers of persons or goods, and the measure by which injuries resulting from their failure to perform their obligations may be prevented or redressed * * * * *

The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are **strictly within the scope of the local law** * * * * *

Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons engaged in the driving management of all railroad trains passing through the state to submit to an examination by a local board as to their fitness * * *

or to prescribe the mode of heating passenger cars in such trains. *Smith vs. Alabama*, 124 U. S. 465; *Nashville C. & St. L. R. Co. vs. Alabama*, 128 U. S. 96; *N. Y. N. H. & H. R. Co. vs. N. Y.* 165 U. S. 628; *Western U. Telg. Co. vs. James*, 162 U. S. 650; *Hennington vs. Georgia*, 163 U. S. 299; *Gladson vs. Minnesota*, 166 U. S. 427. The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa * * * clearly comes within the same principles * * *

the whole object and effect are **to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods.**"

Section 2075 of the Code of Iowa is another instance of alleged class legislation. It provides that the lien of judgment for personal injuries shall be a superior and a prior lien on the property of the company to that of any mortgage or trust deed executed since July 4th, 1862, even though the judgment be obtained after execution and filing for record of the mortgage.

The constitutionality of this section was affirmed in Central Trust Co. et al vs. Sloan et al., 65 Ia. 656.

Supreme Court content themselves by saying, at 657:

"It is said that the statute under consideration is unconstitutional. for the same reasons as were urged in Bucklew vs. Central Ry. Co., 64 Ia. 603, against the constitutionality of section 1307 of the Code (The fellow-servant act). So far as the constitutionality is considered there is no difference between the two sections."

The judgment of the lower court was affirmed.

Section 2046 of the Iowa statute, making prima facie absolute liability in case of fire set out by the railway company, was vigorously assailed in its time as obnoxious to the provisions of the State and Federal Constitutions as class legislation depriving of property without due process of law; depriving defendant of the equal protection of the laws, but it was upheld in

Rodymaker vs. Ry., 41 Ia. 297.

Small vs. C. R. I. & P. 50 Ia. 388.

St. Louis & S. R. R. Co. vs. Matthews, 165 U. S. I; 41 L. Ed. 611.

The Supreme Court of the United States in discussing this case last cited approved the following language from Justice Field in former decision, i. e.

Missouri and Pacific R. Co. vs. Humes, 115 U. S. 512.

Saying: **The harshness, injustice, oppressive character of such laws will not invalidate them as effecting life, liberty or prosperity without due process of law."**

The case just quoted from is, in itself, a very extensive brief and interesting throughout, in that it quotes extensively from various decisions where analogous questions were raised, i. e., constitutional questions; and we have no doubt that the court will read in its entirety this able opinion from Justice Gray.

Section 2163 of the Iowa Code provides that telegraph and telephone companies may not avoid liability for mistakes in transmitting or receiving messages, or for unreasonable delay in the transmission or delivery, or for any other duties required by law, **any contract to the contrary notwithstanding.** This law was assailed, but was upheld in

Garnett vs. West U. Telg. Co. 83 Ia. 257.

The court held that the law should be upheld, notwithstanding any contract made between the sender of the message and the company. We quote from Rothrock, J. page 261:

"In this state of the evidence the restriction of the liability of the defendant is no defense to the action, for the reason that the defendant cannot by contract limit its liability for the plain and palpable negligence of its operators and agents. Defendant cannot contract against its own negligence. This rule was announced by this court in Sweetland vs. Telg. Co. 27 Ia. 433, and we think it is now the settled rule of the country."

Section 1727 of the Code of Iowa provides that a contract between the assured and the insurer that a policy shall be void for the non-payment of premium, even though 30 days notice of delinquency therein provided is not given, shall be void, notwithstanding any contract, **the policy shall stay in force** until after the expiration of said 30 days. This statute has been upheld and not condemned in

Lewis vs. Bond Ins. Co., 71 Ia. 97.

Holbrook Bros. vs. Mill Owners Mutual Ins. Co. 86 Ia. 255.

Section 2077 regulates the fare which railroad companies can charge for the transportation of passengers. The law was attacked as void because unreasonable, but was upheld.

State vs. Chovin, 7 Ia. 204.

Curl vs. C. P. & P., 63 Ia. 417.

Section 2490 of the Code is a sample of special legislation as affecting coal operators. It provides that coal operators employing 10 or more miners, shall not sell, give, deliver or issue, directly or indirectly, to any person employed, for payment for labor done, any script, check, draft or other evidence of indebtedness, payable or redeemable otherwise than in money at the face value * * * * thereby directly **affecting the right of the miners or operator to contract** that their wages shall be payable otherwise than in money. It further provides that all wages "shall be paid in money upon demand semi-monthly;" provides a penalty for failure to make payment within 5 days after demand, that the laborer shall recover the amount due and \$1 per day in addition for every day that payment is neglected or refused, not exceeding the

sum due, and also provides for **attorney fees** in case of such failure to pay. This section has been accepted as good law by all the coal corporations in the state and its terms lived up to, and no thought or suggestion on the part of any person that it is **unconstitutional**; and, yet, there is much more reason for saying it is class legislation, or that it is equal in its application, than in the case of the Temple Amendment. The law is accepted as constitutional as being a proper exercise of the reserve and police power of the state enacting it.

BI-WEEKLY PAYMENT IN DEFIANCE OF CONTRACT

An act of Indiana of February 14th, 1887, provides that wages of miners and certain others shall be paid at least **once in every two weeks** in lawful money of the United States; and the act of March 6th, 1889, of the legislature declares **useless every contract by which the right to receive wages in lawful money at least once in two weeks is waived.**

In *Hancock vs. Yaden*, 23 N. E. Rep. 253, Ind.

The above law of Indiana, which provides a contract between the coal operator and the miner, that the miner should receive his pay in something else except money, is void, and, further, that they should be paid every two weeks, was declared constitutional in every respect.

The case just cited gave a clear field for the airing of defendant counsels' views in-extenso on the "sacred right of contract;" but the Supreme Court, at page 253, says:

"It is the fundamental principle that every member of society surrenders something of his absolute and natural right in all organized states * * * * *. But every man, says Blackstone, when he enters into society, gives up a part of his natural liberty. 'Property and law,' as Betham says, 'are born and must die together.' The right to dispose of property or labor is a right not wholly surrendered by the the state. citizens, nor yet entirely beyond control by the legislature of the state. The right to contract is an incident of this *jus disponendi*. But the right to contract is not, and never has been in any country where, as in ours, the common law prevails and constituted the source of all civil law entirely beyond legislative control. The law declares that payment in part of an ascertained debt shall not extinguish it, al-

though the parties agree that it shall do so. * * * * A party will not be allowed to contract to waive the benefits of homestead of exemption laws. * * * * A debtor cannot waive a stay of execution by contract * * * * By the English law a seaman cannot by contract waive his right to wages * * * * Parties cannot by contract bind themselves in advance not to resort to the courts for redress of wrongs. * * * A contract providing that a party shall not remove a cause to the Federal Court is void. A party will not be allowed to contract without limitation that he will not engage in a particular business. A statute may require parties to insert in a promissory note the words, 'given for a patent,' * * * * A lien for miners' wages may be made superior to the royalty due to the owners of the mine from the lessees or operators. Much beyond the doctrine declared in the cases to which we have referred is the ruling in *Churchman vs. Martin*, 54 Ind. 380. wherein it was held that a statute prohibiting parties from contracting to pay attorney's fees is constitutional. The truth is, that without law as one of its factors, there is really no such thing as a contract. The law is a silent but a ruling factor in every contract. *Canal Co. vs. Coal Co.*, 8 Wall 276, at page 288 * * * It cannot be denied without repudiating all authority, that the legislature does possess some power over the right to contract and, if it does, then, nothing can be clearer than that this power extends far enough to uphold a statute providing that payment of wages shall be made in money where there is no agreement to the contrary made after the services have been rendered."

In the *Legal Tender Cases*, 12 Wall 457, Justice Bradley uses the following language which is apt in this connection: "The answer is in the legislative department, being the nation itself speaking by its representative, has a choice of methods, and is master of its discretion."

Chapter 347 of the statute of Wisconsin provides that when property in that state, insured against fire, shall be totally destroyed without criminal fault of the insured, that the amount written in the policy shall be taken and deemed to be the true value of the property at the time of the loss, and shall be considered the amount of the loss sustained, the measure

of damages, and this notwithstanding any contract between the assured and insurance companies to the contrary.

The Wisconsin statute just referred to was upheld and declared constitutional in

Reilly et al vs. Franklyn Ins. Co. 43 Wis. 489.

Wherein the court unhesitatingly affirmed that it was clearly within the power of the legislature to pass an act in defiance, as it was, of any contract between the insurance company and the assured.

The statute of Missouri have a similar statute, and the same was likewise upheld and declared not to be an infringement of any constitutional provision.

White vs. Conneticut Mut. Life Ins. Co. 4 Dill 177.

Central Law Journal 1877.

Emory vs Piscataqua F. & M. Ins. Co. 52 Me. 322.

Chamberlain vs. Ins. Co. 55 N. H. 249.

The state of Ohio passed a similiar insurance law. The statute was under review in

Queen Ins. Co. vs. Leslie, 24 N. E. 1072.

The law in question was sustained as being a proper exercise of the police power of the state. It is seen the Ohio court takes judicial notice of the unconscionable practice of some corporations, first, in regard to their fine print regulations, and their disposition to insist upon a forfeiture. It says:

"The conditions contained in policies of insurance, both life and fire and the exceptions to the risk, and the contingencies upon which the company would be relieved from liability, became so numerous and complicated, **usually printed in small type** on the back of the policy, in terms in which persons unlearned in the law or business of insurance would not readily understand, that it became a matter of no little difficulty for the assured to tell whether the policy offered him any indemnity or not; and when the event insured against happened, the uncertainty of his claim against the company constrained him to abandon, compromise or litigate it * * * * In the absence of any change increasing the risk, without the consent of the insurers, and also the intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium, shall be paid. * * * * The statute can-

not be treated as conferring upon the assured a mere personal privilege, **which may be waived or qualified by agreement.** It has a broader scope. It moulds the obligation of contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. Terms and conditions embraced in the policy inconsistent with the provisions of the statute are subordinate to it, and must give away."

In *Wall vs. Society*, 32 Fed. Rep. 263.

In referring to the Missouri statute on the same line as to insurance companies and upholding same, the court says:

"It is **notorious that many insurance companies are rigorous in insisting upon forfeitures**, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof, such clamor prompted many legislatures to interfere and seek by legislation, to protect, what they supposed, the rights of the insured. Such seems to have been the thought of the Missouri legislature."

The Missouri statute, hereinbefore referred to making the amount stated in policy the true amount which should be paid by company, **came before the Supreme Court of the United States in**

Orient Ins. Co. vs. Daggs, 172, U. S. 555; 43 L. Ed. 552.

The upholding of the Supreme Court was i. e. the company was not denied the equal protection of the laws nor deprived of property without due process of law, nor improperly denied the right of contract. The court, at page 559, adopts, as its own, the following language: "This right of contract, however, is, itself, subject to certain limitations which the state may lawfully impose in the exercise of its police power."

See, further, as discussing and upholding the Missouri law relating to insurance companies, which defies the contract between the insurance companies and the insured.

Equitable Life Assurance Society vs Peters, 140 U. S. 226; 35, L. Ed. 497.

LEGISLATIVE DISCRETION

The legislature has a discretion vested in it to determine when an act is necessary in the exercise of the reserve and police power. The legislature is conclusively presumed to have made a thorough investigation as to the necessity of the Tem-

ple Amendment.

Part of the caption above, is copied almost verbatim from Powell vs. Pennsylvania, 127 U. S. 678; 32 L. Ed. 257.

When the alleged oppressive Oleomargine laws were being considered by this court and claimed to be contrary to the 14th amendment to the constitution of the United States, it being claimed that the law was unequal in its operation, the court remarking at page 683:

"The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume; and upon reasonable grounds, as must be assured from the record, has determined that the prohibition of the sale, or offering for sale etc. * * * will promote the public health and prevent frauds in the sales of such articles, if all that can be said of this legislation is that it is unwise, unnecessary or oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature or ballot box not to the judiciary."

We, especially, call attention to this decision last cited, in view of the familiar and oft repeated expressions in the argument of counsel for defendant and plaintiff in error, that the consideration of the Temple Amendment, as to its constitutionality, is "purely a judicial question," and not legislative in any respect. The Supreme Court continuing says:

"The latter (the judiciary) cannot interfere without usurping powers committed to another department of government. It is argued in behalf of the defendant that if the statute in question is sustained as a valid exercise of the legislative power, that nothing stands in the way of the destruction by the legislative department of the constitutional guarantee of liberty and property; but the possibility of the abuse of legislative power does not disprove its existence."

That possibility exists even in reference to powers that are concede to exist.

We quote further at page 683:

"The power which the legislature has to promote the general welfare is very great, and the discretion which the department of the government has, in the employment of means to that end, is very large."

It will be remembered the "oleo" act in question abso-

lately prohibits, without qualification the manufacture of oleo, butter or cheese.

The Supreme Court also holds that legislature, in its plenary power, **"can even consult the prejudice of the people"** in making laws of the kind under discussion. As relating to precisely analogous subjects, where alleged oppressive prohibitive measures are adopted by the legislature, and which are upheld as being within the proper scope of the legislature's power, see, also,

State vs. Marshall, 64 N. H. 549;

State vs. Addington, 12 Mo. Ap. 214.

State vs. Addington, 77 Mo. 110;

Butter Etc. Co. vs. Chambers, 36 Minn. 69.

On this subject of the police power of the setate, a very elaborately considered case is

Mugler vs. Kansas, 123 U. S., 623, 31 L. Ed. 205.

In that case the Kansas Prohibitory Law is under review and was upheld; the consideration that the upholding of the law will work loss of property by the owners of the breweries and the like was held to be an incidental, but not controlling consideration, the law being a proper exercise of police powers. It was alleged to be unconstitutional, all because it deprived of life, liberty and property without due process of law. We desire to make the following brief quotation from Justice Harlan's opinion, as helpful doctrine for the determination of the case at bar.

"The principle that no person shall be deprived of life, liberty or property without due process of law, was embodied in substance, in the Constitutions of nearly all, if not all, the states at the time of the adoption of the 14th Amendment; and it has never been regarded as incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in the country is held under the implied obligation that the owners use of it shall not be injurious to the community."

In People vs. Rudd, 117 N. Y. 7.

It is held that a law regulating the price and rates of grain storage was not unconstitutional, but a proper exercise of the police power.

Mr. Justus Story in Charles River Bridge vs. Warren, II

Pet. 605, says:

"Whether the grant of the franchise is, or is not, on the whole, promotive of public interests, is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to **be judicially assumed to be injurious**, and then the grant to be reasoned down. It is a matter exclusively confined to the sober consideration of the **legislature which is invested with full discretion and possesses ample means to decide it.**

See, also, in *Ohio Life Ins. Co. vs. Debolt*, 16 How. 428, The Supreme Court says:

"With the exception of the power surrendered to the constitution of the United States, the people of the several states are unconditionally and absolutely sovereign in their respective territories * * * Franchises, immunities and exemptions from public burdens are improvidently granted, but whether such contracts shall be made or not **is exclusively for the consideration of the state.**

In *Missouri Pacific R. vs Mackey*, 127 U. S. 205, when the United States Supreme Court were considering as to the constitutionality of the Kansas fellow-servant act, the Supreme Court say:

"That its passage was within the contemplation of the legislature we have no doubt * * * * As said by the court below it is simply a question of **legislative discretion** whether the same liabilities shall be applied to carriers by canal and stage coaches as to persons and corporations using steam manufactures. See *Mo. Pac. vs. Humes*, 115 U. S. 27.

In *A. T. & S. F. R. vs. Matthews*, supra,

The laws of Kansas not only give double damages against railways in cases of fire, but also a reasonable atty's fee, was upheld as not being in conflict with the 14th Amendment of the constitution of the United States, as denying equal protection of the law to such company.

Referring to classification, Justice Brewer in his opinion says:

"It is the essence of classification that upon the class is imposed the duties and burdens different from those resting upon the general public."

In *M & St. L R. Co. vs Beckwith*, 129 U. S. 32 L. Ed. 587.

The court, in holding section 1289 of the Code of Iowa as not unconstitutional, which provides for double damages for railways where they fail to fence, in appropriate cases, under the Fourteenth Amendment, the court, by Justice Field, says, referring to the act of the legislature.

"The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. When the calling, profession or business of the parties is unattended with danger to others little legislation will be necessary respecting it * * * * * From these adjudications it is evident that the Fourteenth Amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens."

In *Mo. Pac. vs. Humes*, 115 U. S. 465, in holding as constitutional the Missouri law respecting double damages authorized to be recovered from railroad companies, and in holding in the same as constitutional; The Court says:

"The harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

The legislature of California passed an act "requiring every corporation doing business in this state to pay their employees, and each of them, at least once every month, also to limit the defences which may be set up by such corporations to assignments of wages, set-offs or counterclaims, or the absence of such employees at the time of making payment, and in case of such absence the wages are payable upon demand; to prohibit assignments of wages for the purpose of evading the provisions of this act, and agreements to accept wages for the purpose of evading the provisions of this act, agreement to accept wages at longer periods than as herein provided as a condition of employment; to fix the penalty for the violation of the provisions of this act by such corporation."

The quotation is made from the title of an act set forth in *Skinner vs. Garnett Gold Mining Co.* 96 Fed. Rep. 735, N. D. Cal.

It is seen, from the title of the act here set forth that this was, indeed, drastic legislation, and, indeed, as has been sug-

gested, going nearly to the dividing line. It is seen from the opinion that the act also **prohibits contracts to accept wages** at longer periods than is provided for in the act, as a condition of employment, fixes a penalty for the violation of the provisions of the act by the corporation by fine, and provides that a violation of it shall entitle an employee to a lien for his wages on the property of the company, which shall take precedence over all other liens, except recorded mortgages or deeds of trust, grants an attachment, also, provides for a reasonable attorney fee in case of suit to collect wages, provides that an unrecorded deed is no defense to such suit. Circuit Judge Morrow, delivering the opinion of the court, held that the law was **not unconstitutional** in that it granted special privileges or immunities to any citizen or class of citizens; held, further, that it was not unconstitutional as being in contravention of the terms of the Fourteenth Amendment, in denying the defendant corporation the equal protection of the law; held further, that it was not unconstitutional as depriving a corporation of their property without due process of law; held further, that it was not unconstitutional as **abridging the defendants liberty of contract**. It held that an agreement, made by the employee with his employer to extend the time for payment of the remainder of his wages in consideration of part payment, was invalid, as being opposed to the provision of the law. We desire the court to read this case, as it is a well considered and a thorough brief on this subject of constitutional law, and especially interesting as dealing with the question as to liberty of contract, as to the legislative decretion, the court at page 744 uses the following language:

"Under this provision the act of 1897 must be held as a **legitimate exercise of the plenary powers of the legislature** to modify by general laws within reasonable limits the rights and privileges which corporations of the state possess as such."

The subject of classification is considered exhaustively at page 745, and the familar doctrine reannounced.

At page 746 the court discusses the question of liberty of contract, saying:

"Defendant further contends that the act is unconstitutional upon the ground that it deprives the employee and the

corporations of the liberty of making contracts, and property without due process of law * * * * concerning wages and which are due from the corporations to the employee. * * * * The contention of the defendant as to the constitutionality of the statute must be denied * * * * It cannot be maintained that plaintiff and his assignment had any benefit conferred upon them by such an agreement as is here set forth by defendant."

The legislature of Massachusetts, on April 15th, 1895, passed an act requiring manufacturers to pay wages of their employees once a week. The law comes up for constitution in 163 Mass. 589, before the Supreme Court of the state. We content ourselves with quoting the concluding clauses of the opinion after upholding the law throughout.

"The existing statutes on the subject relating to manufacturing corporations, we do not regard as having been passed necessarily as amendments of their charters. They relate to all the corporations rescribed, **whether there is any power reserved in the legislature to amend their charters or not** and they do not purport to have been passed for the purpose of restricting the corporate powers of the corporations. Without attempting to define the limits of the powers of the General Court in Massachussetts to control **the right of its inhabitants to make contracts generally**, we cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the General Court has the constitutional power to pass, **if deems it expedient to do so** * * * * "the question submitted we think should be answered in the affirmative."

This court will doubtless regard the case of *Holden vs. Hardy*, 169 U. S. 365, **an exceeding important case** in considering the constitutional question. In passing, ante, we referred to it briefly on a side question. It is thought to be important as holding constitutional an extreme act of the legislature of Utah, in providing that no employee shall work under the ground in any mine over 8 hours a day, **even though the employer and employee agree otherwise**. In that case the employee, who was arrested, was working on his own volition and contract, but the Supreme Court of the United States said, that did not figure; that the **legislature having investi-**

gated the matter and made up its mind that it would be for the public good that employee should not work under the ground as a general thing for more than 8 hours per day, even though the contract be to the contrary, that it could not be said that such a law was an infringement of the constitution as abridging the liberty of contract, and, further, that in such a case if the employee were willing to do so and were not demanding the legislation, that then the law was in the proper exercise of the police power of the legislature **"in protecting the employees against themselves."** In speaking of the right of the legislature to abridge and curtail the liberty of contract, Justice Brewer, in delivering the opinion, says, "While this power is inherent in all governments, it has, doubtless, been largely expanded in its application during the past century, owing to the enormous increase in the occupations that are dangerous, or so far detrimental to the health of the employees as to demand special precaution for their well being and protection * * * * * This power, **legitimately exercised**, can neither be limited by contract, nor bartered away by legislation.

The court quotes with approval in the following language from the Supreme Court of Illinois in

Daniels vs. Hilyard, 77 Ill. 650.

"The question, whether certain requirements are a part of a system of police regulation adopted to aid in the protection of life and health, were properly one of legislative determination, and the courts should not, lightly, interfere with such determination, unless the legislature had manifestly transcended its province."

The Supreme Court of the United States adopts with approval the following language from the Supreme Court of Utah, 14th Utah, 98:

"Though reasonable doubts may exist as to the power of the legislature to pass a law, or whether the law was calculated or adopted to promote the public health or safety or comfort of the people, or to secure good order or to promote the general welfare, we must resolve that in favor of the right of that department of the government."

The Supreme Court, in this celebrated case, in recognition of the fact that much faith and credit must be given to the

acts of the legislature, in indulging a presumption that they fairly and fully investigated the question in all its bearings, before passing an enactment, uses the following, as applied to this instant case, singularly appropriate language:

"The legislature has also recognized the fact, which experience of legislators in many states has corroborated, **that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting, the former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment fairly exercised would pronounce to be detrimental to their health or strength, in other words the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority.**"

Much more on the same line, follows in the opinion, as to the inequality of the contracting parties, which language we deem of great importance as applied to the peculiar situation in the case at bar. It occurs to us, that this case, if taken in its true import, practically settles the question at issue in the case on hearing before this court, and it, surely, disposes of many of the authorities cited by counsel from State and subordinate Federal Courts of the United States; the Supreme Court makes reference thus in the concluding portion of the opinion: "**We have no disposition to criticize the many authorities which hold that state statutes restricting the hours of labor are unconstitutional.**" However they are not followed or approved.

We especially commend to the attention of this court the following language from the United States authority last cited from, at page 388.

"**The methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of their power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best, for the public welfare**

without bringing them in conflict with the supreme law of the land."

The Commonwealth of Massachusetts passed a law prohibiting the employment of all persons under the age of 18, and all women from laboring in any manufacturing establishment more than 60 hours per week. It was held that this law did not violate any right which the defendant corporation had under the Constitution, as that was a proper exercise of the police power by the legislature. This law, and its constitutionality, which is affirmed is fully discussed in

Com. vs. Hamilton, 120 Mass. 383.

The case was affirmed on appeal to the Supreme Court of the United States, and found in 169 United States, 393.

In Francis Barbier vs. Patrick Connolly, 113 U. S. 27.

An ordinance of the city and county of San Francisco prohibiting the carrying on of public laundries and wash-houses within certain prescribed limits of the City and County from 10 o'clock at night until 6 o'clock in the morning, was held to be a proper exercise of the police power, and within the competency of every municipality to pass, possessed of the ordinary power to make. The case holds further that a Federal tribunal cannot supervise such legislation; that any correction of the municipal bodies in such matters can come only through state legislation. The case holds further, Field, J.; "Neither the amendment (14th) broad and comprehensive as it is, nor any other amendment, was deemed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations, to promote the public health, peace, morals, education and good order of the people. * * *

Class legislation, discriminating against some, and favoring others, is prohibited; but legislation, which is carrying out a public purpose, is limited in its application to those within the sphere of its operation, which affects alike all persons similarly situated, is not within the amendment."

In Soon King vs. Patrick Crowley, Chief of Police of the City and County of San Francisco, 113, U. S. 703, 28 L. Ed. 1145.

The ordinance of the City and County of San Francisco, which declares that no person or employee in a public laundry or public wash-house within the prescribed limits shall

wash or iron clothes between the hours of 10 o'clock in the evening and 6 o'clock in the morning, or upon any portion of the Sunday, is considered by the court and held not to be void, on the claimed ground that it is not within the police power of the City and County; held, further that it did not discriminate between those employed in the laundry business, and those engaged in other classes of business, or between the different classes of persons engaged in the laundry business. It was held, further, that it is not void, in that if deprived of the right to the many to labor at all times, or on the ground that it was unreasonable in its requirements, or upon any other ground apparent upon the face of the ordinance.

Justice Field, referring to the powers generally of legislative bodies states in rendering the opinion of the court:

"The rule is general in reference to an enactment of all legislative bodies that the courts cannot inquire into the motive of the Legislature passing them, except as they may disclose on the face of the acts, or inferrable from their operation considered with reference to the condition of the country and existing legislation. **The motive of the legislators, considered as to the purpose they had in view, will always be presumed to be, to accomplish that which follows as a natural and reasonable effect of these enactments.**"

The opinion states further: "At any rate, of its necessity for the purpose designated, **the municipal authorities are the appropriate judges.**"

The Kansas statute, providing that the payment of the miners employed by corporations who were in the mining business, should be based upon the coal actually mined without screening, was held to be a proper exercise of the police power, and, hence, constitutional in

State vs. Wilson, 7 Kan. 428.

Much is made by counsel in argument of the utterances of the courts of Penn. and Illinois, and it seems that these isolated courts have taken some strong ground against any kind of legislation which would lean in the direction of helping the laboring man up to a better position, morally, financially and socially; but, as we have seen, they have all been overruled i. e. discredited by the decision to the contrary in precisely analagous aspects by the decisions of the Supreme

Court of the United States heretofore cited; especially, notice, Knoxville vs. Harbison, 183 U. S. 17.

Incidentally cited on another point, where the U. S. Supreme Court held that the law providing that laborers shall not be paid in script, but shall be paid in money, etc. was valid; and, yet, the Illinois courts on a similar and analagous proposition were very emphatic in pronouncing that such laws are unconstitutional. See,

Frorer vs People, 141 Ill. 171.

And, likewise, Pennsylvania seems to have gone on the wrong track.

We have, also, referred to the Missouri ultra views, which we have observed do not harmonize with the views of the Supreme Court of the United States.

We have already called the court's attention by extensive quotations from the Supreme Court of the United States, that it is regarded that the law of Utah limiting the hours in which a miner shall work in the mine to 8 hours is a legitimate exercise of the police powers.

We will not refer to other cases cited because they fall under the ban of either being stale truisms, or else the principles announced, while interesting, are in no way applicable to the controversy here, and throw no light thereon; and as we have already taken more time than we expected when starting out, we desire to hasten this argument to a conclusion.

III

In this division, we want to refer to some observations of counsel. It is stated by counsel in substance as follows: "It must be distinctly kept in mind that the Temple Amendment is an attempt to prevent railroad coapmnies and their employees from makinig contracts for an adjustment of claims based on section 2071 of the Code." This assertion only states part of the truth. The Temple Amendment does not seek to stand in the way of a fair and just settlement of an injury after the injury occurs, and the parties know what there is to adjust and the extent of the damages and all about it; in fact, the Temple Amendment, itself, distinctly states that such contracts, made after the injury occurs, when the parties' eyes are open to the situation—in other words, when an equitable settlement can be made—are expressly reserved by the express

terms of the enactment. But the Temple Amendment does prohibit the railway companies from rendering nugatory the fellow-servants act, by requiring its employees to **contract in advance**, that the mere acceptance of the pittance of daily benefits, which belong to the employees any way, having been paid for by him, that such acceptance shall, as a matter of course and law, settle the bill for a foot cut off or a hand cut off.

We have called attention to the inequities of the regulations, the unconscionable features thereof, the fact they do not provide for substantial compensation in case of permanent injuries, how they might be used by designing corporations to oppress their employees. That, undoubtedly, the legislature investigated all these features pro and con, and in the exercise of their reserve power, of the power to amend and control the regulations of the corporations, and also the police power, that the legislature, in their discretion, determined to pass an enactment to cure, what it deemed, a public evil. And, further reference was made to the fact that this court would not, in such case, treat it as a judicial question.

The Iowa Supreme Court intimated, very clearly, its view on this question, that is, as to whether a contract by a brakeman with the company that he would save them harmless from all negligence if he entered their employ, in

Sedgwick vs. Ry. Co. 73 Ia. 158.

There it was held that the contract might be admitted in evidence to show that there was such a rule of the company, as bearing on the question of contributory negligence, but not to limit the company's liability to pay him damages.

You are asked as to why there should be a different method of adjustment of this class of claims, that is claims of brakemen who are in the hazardous business of operating trains, why receive different treatment at the hands of the Legislature than the "employees in factories."

It is pretty late in the day for counsel to ask such a question as that in this court, in view of the holdings of several state courts, as heretofore cited, and the holdings of which have been approved by the Supreme Court of the United States hereinbefore pointed out. That question was there answered more satisfactorily than we can hope to formulate language to express the idea. These same gentlemen were mak-

ing the same argument as against the fellow-servant law, and you answered the question then just as we feel confident you will answer it again, and that is, that the small army of men, who are daily risking their lives in an employment, as hazardous as that of going to war, are entitled to be a class in themselves, and in making such a component part of the public a class in themselves, the Legislature was guilty of no infraction of the Federal Constitution, which states that every person shall have the equal protection of the law.

IV.

There is a very substantial, satisfactory and conclusive reason why the employee McGuire should succeed in this cause and state court be upheld, and that is that, even though it might be held that the law is unconstitutional, and therefore, invalid, yet, that the regulations in question do not bind him for the reason that **the plaintiff was not a member thereof**, he is not claimed even by counsel in argument to have been a member, and there is no clause or condition is said regulations or in "notice of application" which was the only paper signed by plaintiff, which indicates or even hints that the acceptance of benefits by employees, who simply gives notice of application, shall conclude and bar his rights to recover substantial damages.

This point cannot be glamored over by mere assertion, as counsel will seek to do in argument, or by any slight reference. We rely on it, and the regulations supports us.

Regulation 64 says: "In case of injury to a **member** he may elect etc." The plaintiff had simply signed the notice spoken of in Regulation No. 49. He is there termed an "applicant;" **he had not been examined**. It was not then known that he ever would be a **member**, because if his examination was not satisfactory under the Regulations, he would **not** become a member, and if not a **member**, how could it be said that Regulation 64, as to acceptance of benefits, binds him?

We do not anticipate that the questions here involved will be regarded by this court as close questions. It occurs to us, possibly erroneous in our ardor, but we hope not, that the law is decidedly against the company's position, as shown by your decisions here cited, that the Temple Amendment was

nothing more than the legitimate exercise of the reserve and police power; that Legislature is presumed to have investigated all the reasons for and against the passage of such a law; it is not a judicial question, but simply a legislative one, that they discovered many valid reasons why such a law should be passed, and we have taken occasion to point out some of them, and, in addition, that in no event can the company hope to be successful, in view of the fact that their regulations do not put them in a position to be successful, i. e., that plaintiff **is not a member** of the Relief Department under the terms of Regulations, nor is he claimed to be a member.

It being a law concerning which there seems to be so much divergence of opinion between able men,—and we here refer to the seeming wide divergence of opinion between the 150 distinguished gentlemen who composed the Iowa Legislature that passed the Temple Amendment law, the honored Iowa Court that sustained it, and the U. S. Congress, and the distinguished counsel for the company on the other hand, there being such a wide divergence of opinion, it is important that this matter be settled, and settled for all time, and being a matter of public importance, with as little delay as possible.

We sincerely hope that this Honorable Court, famed not only for its learning, but equally so for its patience, will not deem that we have been unnecessary tedious, in view of the importance of the matters involved and the lengthy argument of adverse counsel, and, besides, the propositions of "inclusion and exclusion" figuring so largely as different questions come up for solution, we were of the opinion that there would be no other satisfactory method of treating the matter in argument, save to point out what various courts had held on various and divers enactments in upholding them as constitutional.

Respectfully submitted,

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I hereby certify that the cost of printing this argument was \$5 cents per page.

CHARLES L. McGUIRE.

I hereby certify that the foregoing certificate is true.

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